

**THE RULE OF LAW OR RULE BY LAW?  
LEGAL REFORM VERSUS THE POWER OF THE  
PARTY-STATE IN THE PEOPLE'S REPUBLIC OF  
CHINA :1978-2002**

JIEFEN LI

SUBMITTED FOR PHD DEGREE  
COLLEGE OF HUMANITIES AND SOCIAL SCIENCES  
THE UNIVERSITY OF EDINBURGH

2005



## Table of Contents

Declaration	iii
Acknowledgement	iv
Abstract	v
Abbreviations	vii
Statutes	viii
Table of cases	ix
 Chapter One: Introduction	
1. The problem of legitimacy and China's response	1
2. A socialist rule of law with Chinese characteristics	5
(1) Official debate on the rule of law	5
(2) The concept of the rule of law	14
A. Rule by law and rule of law	19
B. The model of China's rule of law	21
C. The content of and the key to establishing the rule of law	30
3. Achievements, failures and dilemmas in establishing the rule of law in China	36
4. Introduction of the thesis	45
 Chapter Two: China's administrative legal regime and its limits	47
1. Unfettered administrative power in China	48
2. Principles of administrative rule of law	57
3. Control of administrative power in China	63
4. Conclusion	78
 Chapter Three: Abuse of administrative power: infringing on personal rights and freedom	80
1. The conflict between individual rights and state interests	82
2. Administrative detention without judicial procedures	84
(1) Shelter and investigation	86
(2) Re-education through labour	92
(3) Shelter and repatriation	95
3. Torture for confession and miscarriage of justice	98
4. Insufficient state compensation	105



5. Conclusion	108
Chapter Four: Abuse of administrative power: infringing on property rights in the new marketplace	110
1. Farmers' property rights to land contract	111
2. Infringing on enterprises' property rights	117
3. Administrative monopoly and control	127
4. Conclusion	134
Chapter Five: Judicial independence: a long way to go	137
1. Judicial independence: a hard goal to gain	138
(1) Party control over the judiciary through its Political and Legal Commission	140
(2) Internal influence over the courts and judges	146
(3) Administrative influence from local government	148
(4) Social connections and networks	151
2. Judicial fairness and efficiency	153
(1) Judicial unfairness and corruption	154
(2) Efficiency and right protection	154
(3) Failure in judicial review of Party-state power	157
3. Conclusion	163
Chapter Six: An official-based legal culture	165
1. Legal tradition based on the rule of man	167
(1) Unequal treatment of individuals according to there social status	168
(2) The combination of judicial and administrative powers	169
(3) The domination of penal law and the poor development of rights	170
(4) Consolidating family values and collective interests	171
2. Legal culture in contemporary China	172
3. A case study: the attitude towards lawyers	187
4. Conclusion	195
Chapter Seven: Conclusion	196
Bibliography	201

## **Declaration**

All work, unless otherwise acknowledged, is my own. No part of this thesis has been submitted for any other degree or professional qualification.

Date 15/07/2005



## Acknowledgements

In the course of writing up this thesis, I have received help from a great number of people. Above all, I am greatly indebted to my principal supervisor Professor Bonnie S. MacDougall for her generous offer to be my supervisor at a crucial stage, for her precious help and encouragement, and for her pertinent comments on fundamental parts of my thesis.

I am deeply indebted to Dr. Julian Ward, my second supervisor, for his coherent availability of offering invaluable support and guidance throughout this project, and for the inspiring questions he raised to me during a mock viva.

I owe special thanks to Dr. Anders Hansson, who was my principle supervisor in the first year of this project, for his valuable support to my initial application for PhD study at the University of Edinburgh (UoE), for his willingness to read and comment on parts of the manuscript, and for his participation in the mock viva. My gratitude also goes to Dr. Tommy McClellan for his professional interest in this project and for his arrangement of the viva on my behalf.

I would also like to express my gratitude to my husband, Xiaohuan, for his close and critical reading of the whole manuscript, and for his consistent support and encouragement. My American friend Andy Straw in Dunedin, New Zealand, proof-read the whole manuscript and offered me good advice on style and format; Tae Shim, a fellow PhD student of mine at UoE, assisted me in editing and printing the manuscript for submission; and Dr. Yuan Zhengqing in the Chinese Academy of Social Sciences (CASS) in Beijing helped me greatly with locating references and collecting primary sources, to whom I am grateful.

My PhD study at the University of Edinburgh was made possible by an ORS scholarship from the Committee of Vice-Chancellors and Principals of the Universities of the United Kingdom (CVCP), and a UoE's Premier Research Studentship. Finally, I would like to express my thankfulness to the UoE's Main Library, Law Library, ArtLAN, and the National Library of Scotland, for their efficient and patient handling of all my requests.

## Abstract

The present research is devoted to a study of the ongoing legal reform in contemporary China, with special reference to its rule of law [*fazhi* 法治] project. The aim of the reform is to build China into a modern state with a legal system suitable for a market economy and also to improve the political legitimacy of the Chinese Communist Party (CCP). The official-preached version of the rule of law is a socialist rule of law with Chinese characteristics. What is the real meaning of this formulation? What motivations are behind the legal reform? What tasks does this reform set for itself? And what model does it follow?

With these questions in mind, I would like to conduct an exploration into the relationship between political legitimacy and the rule of law, and then trace the process of CCP's seeking legitimacy since the late 1970s. The Party-controlled discussion over issues relating to the rule of law shows that the regime has repeatedly rejected the Western model of rule of law as alien and unsuitable for socialist China, and that it has tried all the time to replace it with the concept of rule by law [*fazhi*, 法制] through regularisation and institutionalisation of the state and society to strengthen its power. What the regime needs from legal reform is to use the law to regulate the economy, the bureaucracy, and the society while the ruling Party is able to stay above law and control the situation at all times. However, non-official scholars, albeit under the Party's political and ideological restrictions and supervisions, argue that the model for China's rule of law should be a top-down and government-enforced, and gradual and slow, process, by taking advantage of Western legal rules and Chinese legal tradition and by being guided by the Party. The focus of China's legal reform is to realise a government of exercising administrative power according to law [*yi fa xingzheng*, 依法行政]. China's legal reform is thus carried out without political democracy and freedom, and the political reform is confined within the administrative system.

It is fundamental in a society that the political and administrative power should be constrained by the law in order to establish a real rule of law. In order to illustrate the characteristics of China's socialist version of the rule of law, I would like to devote the

following part of this thesis from Chapter Two to Chapter Six to a critical review of the role of the Party and government in the legal reform to see whether there is an effective administrative legal system to regulate and curb state power, whether the law is able to protect the rights of individuals and enterprises, whether the judiciary is powerful enough to check official arbitrariness, and whether there is a favourable legal culture for promoting the rule of law.

From a close study of legal documents and cases conducted in previous chapters, this thesis will conclude that, within the current political framework, a socialist rule-of-law system with Chinese characteristics, which is designed to strengthen the Party-state power rather than weaken it, is nothing other than a legalist rule by law with the Party-state remaining above the law. This is the fundamental cause for the frustration and constraint for implementing the rule of law. In contemporary China, there is in general not a real rule of law simply because it is in conflict with the Party's efforts to strengthen its raw political power.

## Abbreviations

**AC:** The Adjudication Commission  
**ALL:** The Administrative Litigation Law  
**APL:** The Administrative Penalties Law  
**ARL:** The Administrative Redress Law  
**ARL:** The Administrative Redress Law  
**ASL:** The Administrative Supervision Law  
**CAT:** The (UN) Convention against Torture  
**CCP:** The Chinese Communist Party  
**CL:** The Criminal Law  
**CPL:** The Criminal Procedural Law  
**CCDI:** The Central Committee of Discipline and Inspection  
**CIETAC:** China International Economic and Trade Arbitration Commission  
**FCP:** The Four Cardinal Principles  
**FDI:** Foreign Direct Investment  
**ICAB:** The Industrial and Commercial Administrative Bureau  
**NPC:** The National People's Congress  
**PSB:** The Public Security Bureau  
**PLC:** The Political and Legal Commission  
**PRC:** The People's Republic of China  
**RAPSS:** The Regulation of Administration and Punishment of Social Security  
**RETL:** Re-education through Labour  
**SOE:** The state-owned enterprises  
**SI:** Shelter and Investigation  
**SPC:** The Supreme People's Court  
**SPP:** The Supreme People's Procuratorate  
**SCL:** The State Compensation Law  
**TDC:** The Trade and Development Council (Hong Kong)  
**UDHR:** The (UN) Universal Declaration of Human Rights  
**WTO:** The World Trade Organisation

## Statutes

- Zhonghua renmin gongheguo xianfa** [The Constitution of the People's Republic of China], enacted in 1982 and revised in 1988, 1993, 1999, and 2004.
- Zhonghua renmin gongheguo lifa fa** [The Legislative Law of the People's Republic of China], enacted in 2000
- Zhonghua renmin gongheguo renmin fayuan zuzhi fa** [The Organic Law of the People's Courts of the People's Republic of China], enacted in 1979 and revised in 2004.
- Zhonghua renmin gongheguo quanguo renmin daibian dahui he geji renmin daibiao dahui zuzhi fa** [The Organic Law of the People's National Congress and Regional People's congresses of the People's Republic of China], enacted in 1982.
- Zhonghua renmin gongheguo xingzheng susong fa** [The Administrative Litigation Law of the People's Republic of China], enacted in 1989.
- Zhonghua renmin gongheguo guojia peichang fa** [The State compensation Law of the People's Republic of China], enacted in 1995.
- Zhonghua renmin gongheguo xingzheng jiancha fa** [The Administrative Supervision Law of the People's Republic of China], enacted in 1997.
- Zhonghua renmin gongheguo xingzheng chufa fa** [The Administrative Penalties Law of the People's Republic of China], enacted in 1996
- Zhonghua renmin gongheguo xingzheng fuyi fa** [The Administrative Redress Law of the People's Republic of China], enacted in 1999.
- Zhonghua renmin gongheguo zhi'an guanli chufa tiaoli** [The Regulation of Administration and Punishment of Social Security], enacted in 1957 and revised in 1986 and 2004.
- Zhonghua renmin gongheguo xingfa** [The Criminal Law of the People's Republic of China], enacted in 1979, revised in 1997, 1999 and 2005.
- Zhonghua renmin gongheguo xingshi susong fa** [The Criminal Procedural Law of the People's Republic of China], enacted in 1996.
- Zhonghua renmin gongheguo tuti guanli fa** [The Land Management Law of the People's Republic of China], enacted in 1988 and revised in 1999.
- Zhonghua renmin gongheguo faguan fa** [The Judges' Law of the People's Republic of China], enacted in 1997, revised in 2001

## Table of cases

Case of Wang Kaifeng's illegal provision of loans	52
Yao Li v the Bank of Construction, Daqing Branch	82
Cases of virgin girls committing prostitution	88-90
Case of Tong Yi being maltreated in the labour camp	92
Case of Falungong follower Liu Wenping	93
Case of Zhang Sen in the shelter centre in Guangzhou	96
Case of Xuzhou repatriation station	97
Case of Xing Wei murdering his wife	99
Cases of Sui Hongjie brothers, et. al. in Zhaodong	99-101
Case of Zhao Bijian, et. al. requesting state compensation	106
Case of Shi Yansheng requesting state compensation	106
Case of Wang Chunyu requesting state compensation	106
Zhao Yurong v the Village Committee in Fuyang, Anhui	115
Case of the Jinan Technical Supervision Bureau of Quality Control	118
The hearing of deciding Beijing Subway fares	119
A private company v Liangzhong government	119
A joint-venture v a District ICAB in Shanghai	121
The Hong Kong Lihua Investment Ltd v Liu Guanghui	121
The Jinghua Yidi Medical Equipment Company v the Ministry of Agriculture	123
Case of the Southern Security Exchange Centre	128
Case of Chen Yan's illegal operation of internet telephone business	128
Individual industrial case of Beijing taxi monopoly	129
The Sichuan PLC v Lan Hai	144
Ma Deming v He Guicai	152
Ma Yijun v Mishan government, Heilongjiang	159
Wu Chengnong v Rui'an government, Zhejiang	159
Wo Boliang v a village committee in Nanfeng, Jiangxi	160
Cases of Image projects or political performance projects	173
Cases of buying and selling official posts	176
Case of collapse of the Guangdong International Trust and Investment Cooperation	185
Cases of lawyers' status in contemporary China	187



## Chapter One: Introduction

### ---A Socialist Rule of Law with Chinese Characteristics

#### 1. The problem of legitimacy and China's response

Whenever radical social change happens, the model of authority usually has to transform itself in order to regain legitimacy. According to Max Weber, there have been three ideal types (or pure types) of authority during the transformation from a traditional society into a modern one.<sup>1</sup> These three types, the patrimonial, charismatic, and legal-rational modes, have had a long-term impact on the study of social modernisation and political legitimacy.

Weber argues that human society has experienced a gradual evolution from relying first on "an established belief in the sanctity" of the divine right of monarchs, then on "devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him," and then on a legal-rational model based on a belief in legalising normative rules and the government decision-making being limited by these rules.<sup>2</sup>

The legal-rational model of legitimacy emphasises rationality and the supremacy of law. The rules here must be objective and impersonal, and the ruler is subject to the same laws as everyone else since these rules are widely accepted by society. Obedience on the part of subjects is given to formal norms rather than to persons.<sup>3</sup> A Weberian legal-rational model or legal dominance, based on Western democratic societies, has long been regarded as a model of political legitimacy in modern society. However, scholars of comparative communism argue that legitimacy in the communist world does not necessarily have to be based on a legal-rational type, and instead can focus on goal-rationality based on Communist goals.<sup>4</sup> In other words, a socialist country may justify its legitimacy by designing certain goals in different periods by mainly relying on officials rather than the people, in the absence of the rule of law and political democracy. This goal-rationality based on communist ideology and command leadership has served as a form of legitimacy in many communist societies such as the former Soviet Union and pre-reformed People's Republic of China (PRC).

---

<sup>1</sup> For his account of the three ideal types of leadership, see Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (New York: Bedminster, 1968).

<sup>2</sup> Weber, pp. 227 and 241-245.

<sup>3</sup> Weber, pp. 217-219.

<sup>4</sup> For his full account of goal rationality, see T H Rigby, "Introduction: Political Legitimacy, Weber and Communist Mono-Organisational Systems", in T H Rigby & F Feher (eds.), *Political Legitimation in Communist States* (London: Macmillan, 1982), pp. 1-26.

However, Holmes argues that in many communist states this goal-rational legitimacy has encountered serious crisis and started to change since the 1980s.<sup>5</sup> These countries have started to seek legitimacy both from the people and the officials primarily in terms of economic performance and social welfare. Thus, improvement in economic performance and social welfare, which according to Holmes, is often referred to as social eudaemonic legitimation, could be effective as a model of legitimacy. This eudaemonic model is usually used by the communist countries to improve their legitimacy by satisfying the growing material aspirations of the people.<sup>6</sup> With the improvement in living standards, people's attitude towards the government will change, and the Communists will remain firmly in control.

At the same time, however, Holmes claims that the eudaemonic model could also become problematic to the leadership and the legitimate process.<sup>7</sup> A good economic performance requires reforming both the economic and political systems, leading inevitably to a diminution of officials' power and interests. During reform times, in order to maintain its legitimacy, the state has to appeal more to the people than to its officials by emphasising restricting state power and protecting private rights. With the economic reform intensified, officials will increasingly become obstructive since their decision-making power will be further limited. China's widespread corruption and anti-corruption campaigns, as he observes, is a symbol of crisis of legitimation.<sup>8</sup> If economic reform fails to reach its goals, the process could engender growing hostility among the officials towards the regime, "leaving both an alienated staff [bureaucrat] and a frustrated citizenry."<sup>9</sup>

It follows from this that eudaemonism sooner or later proves inadequate because demands in society for a deeper move into legal-rationality will increase as the reform continues. Yet this demand for legal rationality, or for the rule of law, will ultimately become incompatible with communist ideology and its political system. The ideology will be adapted to changing circumstances and thus become blurred, giving rise to an identity crisis to the existing leadership. Holmes believes that such a conflict will eventually endanger the process of legitimation and further result in collapse of a communist system, as happened in the Eastern European communist bloc.<sup>10</sup> Unless the leadership really committed itself to the rule of law, its legitimacy would be insecure. However, such commitment to the rule of law

---

<sup>5</sup> Leslie Holmes, *The End of Communist Power: Anti-Corruption Campaign and Legitimation Crisis* (Cambridge: Polity Press, 1993), p. 10.

<sup>6</sup> Holmes, p. 15.

<sup>7</sup> Holmes, p. 16.

<sup>8</sup> Holmes, preface: xiv.

<sup>9</sup> Ibid.

<sup>10</sup> Holmes, p. 40.

will eventually result in the dissolution of an authoritarian regime, requiring the leadership to completely deny its ideology and ruling position.

The communist regime's attempt at political legitimacy is happening in China. When Deng Xiaoping came to power in the late 1970s, he faced a profound crisis of legitimacy for the leadership of Chinese Communist Party (CCP) and its ideology. In order to rebuild the Party-state's legitimacy, Deng launched a policy of economic reform and an opening-up project with the goal of improving people's living standards and realising the "four modernisations" (of agriculture, industry, science and technology, and national defence). At the same time, Deng called for the strengthening of socialist democracy and the legal system in order to regularise the government and prevent the recurrence of upheavals like the Cultural Revolution, during which Deng and many other senior politicians suffered persecution or torture.

The process of legitimation in China is primarily an ideological adjustment. In order to justify universal reforms, Deng Xiaoping brought forth a theory of a socialist country with Chinese characteristics. Over the last twenty years the CCP has carried out several experimental stages in finding a balance and combination between a market economy and socialism. In order to seek ideological justification for a socialist market economy, the Party preached a theory of a socialist preliminary stage in which the primary task is to develop a commodity economy and thus a market economy and legal rules are necessary. In 1992, the CCP made a breakthrough in its ideology by introducing the goal of building up a socialist market economy. In order to form a legal framework for a socialist market, the CCP further endorsed the goal of building a socialist country based on the rule of law in 1997 and revised the constitution in 1999 accordingly.

Since 1978, China's official discourse in legal development has correspondingly evolved from a requirement "to strengthen socialist democracy and the legal system" [*jiaqiang shehuizhuyi minzhu he fazhi*, 加强社会主义民主和法制] to the need to "administer the state according to law and build a socialist country based on the rule of law" [*yi fa zhi guo, jianli shehuizhuyi fazhi guo*, 依法治国, 建立社会主义法治国]. Lately Jiang Zemin calls for "combining the rule of law with rule of virtue" [*yi fa zhi guo yu yi de zhi guo xiang jiehe*, 依法治国与以德治国相结合].<sup>11</sup> The new goal of building a market economy and its subsequent remarkable achievements, for the time being, appease public discontent about the

---

<sup>11</sup> Jiang Zemin raised this discourse on his tour of Guangdong in early 2000. Later next year, he gave a speech in which he required that rule of virtue and rule of law to be implemented in building up the Party and state. See Comment of *Renmin ribao*, "Ba yi fa zhi guo he yi de zhi guo jiehe qilai" [To combine administering the state according to law with administering the state according to virtue], *Renmin ribao*, 1 February 2001, p. 1.

Party leadership in the past, especially, during the Cultural Revolution, its crackdown on the 1989 Democratic Movement, widespread political corruption, and social inequality.<sup>12</sup> Thus, from goal-rationality to economic performance, the Party leadership eventually, might reluctantly, finds that a legal-rational type cannot be avoided for building its legitimacy. This shows that the Party has realised that economic performance alone is not sufficient to maintain its legitimacy; and that the rule of law is necessary for strengthening its ruling position through legalising the economy and administrative power.

However, the rule of law is a double-edged sword to the regime. On the one hand, the rule of law is used to fulfil the goals such as economic development and the removal of official corruption, which are also crucial to the process of legitimation. On the other hand, however, the establishment of a genuine rule of law will undeniably endanger the power of the CCP. It is hard to suggest that the CCP could strike a balance: to grant a limited degree of legal-rational rule to promote economic growth and curb corruption but not extend the legal-rational principles so far that the Party control of political power is threatened. It is unclear whether the communist leadership endeavours to elevate the rule of law to a superior position among its many other goals, and whether the ruling elite itself voluntarily accepts meaningful constraints by law. If the leadership has treated the rule of law with an ambivalent attitude, contradictions and dilemmas will exist from the very beginning and become increasingly prominent with further moves towards legal rationality. This conflict will cause powerful resistance among the bureaucracy to deeper reforms of the political system, and correspondingly legal reform will be restricted within certain boundaries.

There are many theoretical problems remaining to be defined and debated, such as whether establishing the rule of law will eventually fortify the CCP's legitimacy, how China will resolve the conflict between the rule of law and the Party supremacy over state and society, what model of China's rule of law will adopt, how the pace of economic reform will affect legal reform, and whether the current legal reform will eventually lead China to the rule of law. In order to understand these questions, it is necessary to examine both official and academic debates on legal reform and also the process of legal reform itself, since these decide the future and direction of legal reform. It is also important to review legal scholars' research on the rule of law with Chinese characteristics, the achievements and constraints of legal reform, as well as Western assessment of China's rule of law.

---

<sup>12</sup> Henry Rosemont, "Asia: China's New Economic Reforms: Replacing Iron Rice Bowls with Plastic Cups", *Z Magazine*, 8 September 2002 (<http://www.zmag.org/zmag/articles/rosemontjune98.htm>).



## 2. A socialist rule of law with Chinese characteristics

### (1) Official debate on the rule of law

China's legal culture is an "elite legal culture"<sup>13</sup>. It is only fragmentary ideas manifested by top rulers, like Deng Xiaoping, Peng Zhen and Jiang Zemin, backed up by institute scholars or scholar-officials. Deng Xiaoping's idea of law is a part of his theory of socialism with Chinese characteristics. By referring to the phrase "strengthening the legal system" rather than the rule of law, he used the two terms "institutionalisation" and "legalisation" [*zhiduhua he fazhizhua*, 制度化和法制化], to instruct the direction of legal development. As a result, legal construction in Deng's realm aims to regularise the work of the government and maintain social order through massive work on legislation and institutional building.

Deng Xiaoping's legal thinking, although fragmentary, contains some preliminary principles required by the rule of law. His legal ideas are highlighted in a widely-quoted paragraph: "In order to safeguard people's democracy, it is imperative to strengthen the socialist legal system so that democracy is systematised and written into law in such a way as to ensure the stability, continuity and full authority of this democratic system and laws; *there must be laws for people to follow, these laws must be observed, their enforcement must be strict and lawbreakers must be dealt with.*"<sup>14</sup> [the italicised part refers to the sixteen characters of Deng's legal thought: *you fa ke yi, you fa bi yi, zhifa bi yan, weifa bi jiu*, 有法可依, 有法必依, 执法必严, 违法必究]. This paragraph is summed up by both official and academic circles as bearing four features of a modern legal system: to perfect the law, to observe the law and to act according to law, to ensure equality before the law, and to strengthen the supreme authority of the law.<sup>15</sup>

In review of lessons from the Cultural Revolution, Deng realises the need to restrict state power, separate the Party from government, and rely on law rather than man to resolve problems. In doing this, he calls for legalising the ideology and Party policy through making laws to justify them, and regularising state management. According to him, institutionalisation of state and government power is a guarantee for preventing individual

---

<sup>13</sup> Pitman B. Potter, "Foundations of Elite Legal Culture in the PRC: The Influence of Peng Zhen", in *Association for Asian Studies (USA): AAS Abstract: China Session 211*, access on 4 July 2001 (<http://www.aasianst.org/absts/1996abst/china/c211.htm>). For Potter's other studies of China's legal culture, see, "Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China", *The China Quarterly*, no. 138 (1994), pp. 325-358, and his book, *The Chinese Legal System: Globalisation and Local Legal Culture* (London: Routledge, 2001).

<sup>14</sup> The Communiqué of the Third Plenum of the Eleventh Congress of the Central Committee of the CCP (held on 22 December 1978), *Beijing Review*, no. 52 (29 December 1978), p. 14.

<sup>15</sup> Zhang Zhengde, "Women de mubiao shi shehuizhuyi fazhi guo" [Our goal is a socialist country based on the rule of law], *Xiandai faxue*, no. 5 (1988), p. 13.

arbitrariness, and the correct handling of the relationship between the Party and the government is crucial to reducing the instances of the rule of man.<sup>16</sup> He attributes the phenomena of rule of man and the lawlessness during the Cultural Revolution to the Chinese tradition of the excessive centralisation of political and economic powers.<sup>17</sup> He said, "Very often, what leaders say is taken to be the law and anyone who disagrees is called a law-breaker. Such laws change whenever a leader's views change."<sup>18</sup> He claims that "democracy has to be institutionalised and written into law, so as to make sure that institutions and laws do not change whenever the leadership changes or whenever the leaders change their views."<sup>19</sup>

Deng Xiaoping calls for building up a set of supervision systems in order to effectively control the power and avoid the mistake of Mao and Stalin.<sup>20</sup> At the same time, he requires to design a set of supervision mechanisms with Chinese characteristics in order to restrict state power in a limited extent without hampering efficient management. He says: "Excessive power concentration hampers the enforcement of socialist democracy and the Party's democratic centralism, the development of socialist construction, and the development of collective wisdom and causes individual arbitrariness".<sup>21</sup> He also says, "If excessive emphasis is placed on a mutually limited system, it maybe still cannot solve the problem".<sup>22</sup>

He disregards the idea that officials and Party members should enjoy privileges and requires that state officials should be equal to ordinary before the law, and especially Party members should be constrained by Party constitution and discipline. He says that "citizens are equal before the law, and [Party] members are equal before the Party constitution and discipline. Everyone enjoys equal rights and bears legal liabilities. Nobody can take advantage or breach the law. Whoever breaches the law must be put under investigation by the public security agencies and tried by the judicial agencies. Nobody is permitted to

---

<sup>16</sup> Deng Xiaoping, "Guanyu zhengzhi tizhi gaige wenti" [On the problem of reform of political system], in *Deng Xiaoping wenxuan*, vol. 3 (Beijing: Renmin chubanshe, 1993), p. 177.

<sup>17</sup> Deng Xiaoping, "Gaige dang he guojia de lingdao zhidu" (Reforming the leadership system of Party and state), *Deng Xiaoping wenxuan*, vol. 2 (Beijing: Renmin chubanshe, 1984), p. 333. as for translation of Deng's word cited from vol. 2, I have consulted its English version with very little change (see *Selected Works of Deng Xiaoping, 1975-1982*, Beijing: Foreign Language Press, 1984, pp. 157-158).

<sup>18</sup> Deng Xiaoping, "Jiefang sixiang, shi shi qiu shi, tuanjie yiahi xiang qian kan" [Emancipate the mind, seek the truth from facts and unite as one in looking to the future], *Wenxuan*, vol. 2, p. 136.

<sup>19</sup> Ibid.

<sup>20</sup> Deng Xiaoping, vol. 2, pp. 331 and 333.

<sup>21</sup> Ibid, p. 321.

<sup>22</sup> Deng Xiaoping, vol. 3, p. 256.

interfere in the implementation of the law, and anyone who infringes the law must not escape from legal punishment."<sup>23</sup>

In addition, he stresses the importance of legal education among the public, calling for improving people's legal consciousness [*falü yishi*, 法律意识] in all social sectors, including schools, Party organisations, government agencies, enterprises and individuals.<sup>24</sup> He considers that the criteria for evaluating laws and legal systems are their ability to improve people's material life, to foster spiritual civilisation in the socio-cultural area and to promote democracy in the political realm.<sup>25</sup>

At the same time, however, Deng Xiaoping regards political stability and economic growth as two prime concerns in the process of promoting democracy and strengthening the legal system.<sup>26</sup> Legal construction has always been viewed in official texts as part of socialist spiritual civilisation [*shehuizhuyi jingshen wenming*, 社会主义精神文明], which encompasses traditional values, socialist ideology and Party goals. It has been written into the constitution as a spiritual fence against Western influences.<sup>27</sup> Deng calls for the grasping of economic reform and construction with one hand, and law and socialist spiritual civilisation with the other, with equal priority and toughness [*liang shou zhua, liang shou dou yao ying*, 两手抓, 两手都要硬]. The aim for the "two grasps" is the attaining of economic growth while resisting the influence of Western liberal thought.

The ideological boundary Deng designs for all-round reform is the "four cardinal principles (FCP)": adhering to the socialist road, the dictatorship of the proletariat, the Party leadership and Marxist-Leninist Theory and Maoist thought.<sup>28</sup> This restriction has set a bottomline for the reformers and also provided hope for pragmatic thinking. As Carlos Wing-Hung Lo comments, "on the one hand, 'the four cardinal principles' were designed to provide an ideological safeguard against the possibility that emancipating the mind from dogmatism could lead to the negation of Marxism. On the other hand, the fact that they were interpreted as *living* [originally *italised*] anti-dogmatic principles offered much hope for emancipation."<sup>29</sup>

---

<sup>23</sup> Ibid.

<sup>24</sup> Deng Xiaoping, vol. 2, p. 360.

<sup>25</sup> Ibid, p. 315.

<sup>26</sup> Ibid, p. 330.

<sup>27</sup> "Zhonghua renmin gongheguo xianfa" [The constitution of the PRC], article 126, promulgated in 4 December 1982 at the Fifth Session of the Fifth National People's Congress. In *Zhonghua renmin gongheguo falü huibian, 1979-1984* [Collection of PRC laws] (Beijing: Renmin chubanshe, 1985), pp. 17-20.

<sup>28</sup> Deng Xiaoping, "Jianchi si xiang jiben yuanze" [Upholding the four cardinal principles], Vol. 2, pp. 150-151.

<sup>29</sup> Carlos Wing-Hung Lo, "Socialist Legal Theory in Deng Xiaoping's China", *Columbia Journal of Asian Law*, no. 11 (1997), p. 477.

Thus Deng's institutionalisation and legalisation is not the same as the rule of law. Law is used to serve the Party's economic goals and strengthen its ruling position as well as its ideology, rather than put the Party under the control of law. Eventually law is an instrument at the Party's discretion. His legal reform is based on strict ideological and political restriction without allowing for changes to socialist system and one Party rule. This can be well demonstrated from the Party's call for a halt to the reform on the separation of the Party and the government in the late 1980s. During that time there were growing calls for human rights and political democracy, finally propelling the 1989 Democratic Movement. The plan for limited political reform, which was formulated by Zhao Ziyang in the Thirteenth CCP Congress held in 1987 and based on Deng's ideas at the time on reforming the Party and state system, aimed to separate the Party and government, government and business, and to absorb more intellectuals into the leadership.<sup>30</sup>

Since 1989, however, the CCP has become very cautious about political reform in fear of a Soviet-like breakdown. The regime repeatedly stresses the utmost importance of stability and development. Party control over all sectors is strengthened. The Party, on the one hand, reaffirms that political reform will remain an important goal, while on the other hand it adjusts the goal of political reform to improve government efficiency, strengthen the vitality of Party and state, combat bureaucracy and corruption, and foster enthusiasm among the people for political participation at rural levels.<sup>31</sup> Deng later viewed the idea of separation of Party and the government as a manifestation of "bourgeois liberalisation."<sup>32</sup> Instead, he said that the Party must change its working style by focusing on more important decision making processes and the separation of the day-to-day running of state affairs. One basic strategy was to make Party policies into state laws through legal procedures, with the Party then taking the lead to abide by these laws within the constitution. By doing so, the Party leadership would be strengthened and the working efficiency of the government would be improved since these laws were based on Party lines, policies, and goals.

---

<sup>30</sup> Su Shaozhi (the former director of the Institute of Marxism-Leninism Studies of the China's Academy of Social Science and went to America after Zhao Ziyang's leaving from the power), "Deng Xiaoping shidai Zhonggong zhengzhi tizhi gaige de lilun he shijian" [Theory and practice of the CCP on reforming the political system in Deng Xiaoping era], *Dangdai Zhongguo yanjiu*, 66: 3 (1999), accessed on 4 March 2002 (<http://www.chinayj.net/StubArticle.asp?issue=990305&total=66>).

<sup>31</sup> For example, see Deng Xiaoping (18 January-21 February 1992), "Zai Wuchang, Shenzhen, Zhuhai, Shanghai deng di de tanhua yaodian" [Summary of the talk in Wuchang, Shenzhen, Zhuhai, and Shanghai], *wenxuan*, vol. 3, pp. 379 and 381.

<sup>32</sup> Deng Xiaoping, vol. 2, p. 302 and vol. 3, p. 324. For a detailed discussion of Deng's criticism of Zhao Ziyang and its impact on China's political reform, see Willy Wo-Lap Larn, *China after Deng Xiaoping* (Singapore: John Wiley & Sons, 1995), pp. 241-245; Merle Goldman, *Sowing the Seeds of Democracy in China: Political Reform in the Deng Xiaoping Era* (Cambridge, Mass.: Harvard University Press, 1994), pp. 234-235.



In addition to ideological and political restriction, legal reform is also restricted by the pace of economic reform and Party policy relating economic development. Law is mainly to serve and facilitate the pragmatic needs of the economic development. After 1992, legal reform arrives at a new stage for serving the needs of a socialist market economy. Scholars advocate that "a market economy is a rule-of-law economy"<sup>33</sup>, and begin to study the relationship between the two concepts and to work out a legal framework for the market economy. Official texts do not use the term "rule of law" until 1997 when this term is formally brought forward at the Party's Fifteenth Congress as "*Yi fa zhi guo, jianli shehuizhuyi fazhi guo*" [administering the state according to law and establishing a socialist rule-of-law country].<sup>34</sup>

However, the use of <sup>the</sup> term rule of law does not necessarily mean that the Party has really committed itself to the rule of law. *Yi fa zhi guo* [依法治国] is not the same as rule of law, nor does a rule-of-law with socialist prefix. One will clearly assume this conclusion from following concerns. First, Party and governmental officials always use the discourse "socialist legal system" or *yi fa zhi guo* without differentiation rule of law from rule by law. Except some legal scholars, the vast majority of Chinese people are not aware the difference between the two concepts. To the public, the legal system or rule by law and rule of law are all the same in their pronunciation in Chinese as *fazhi*. Moreover, imperial legal system has had thousands of years of tradition by using law as an instrument to rule the people rather than ruling class and as a supplement to Confucian morality, which are still deeply influencing the mind of ordinary people, and besides the rule of law is not from Chinese legal culture. In this particular circumstance, the distinguishment of rule by law and rule of law is essential for the general public to understand without misleading them.

Second, in many occasions, the Party always rejects Western concept of multi-party politics, tripartite division of powers, judicial independence and human rights, as a bourgeois ideology, which is contrary to socialism and a socialist legal system. Jiang Zemin makes it clear that "we uphold and improve this fundamental political system, instead of copying any Western models. This is of decisive importance for upholding leadership by the Party and the

<sup>33</sup> There are many books and articles on this topic. For example, Qiu Chunlan, "Shichang jingji yu fazhi jianshe zongshu" [A summary of the study on market economy and legal construction], *Shoudu shifan daxue xuebao*, no. 4 (1995), pp. 76-79; Xie Pengcheng, "Lun shichang jingji falü tixi de jiben jigou" [On the basic structure of the legal system in a market economy], *Faxue yanjiu*, no. 4 (1994), pp. 50-57.

<sup>34</sup> Jiang Zemin, "Gao ju Deng Xiaoping lilun de weida qizhi, ba jianshe you zhongguo tese de shehuizhuyi quanmian tui xiang ershiyi shiji" [Upholding the great banner of Deng Xiaoping theory to fully push the establishment of socialism with Chinese characteristics into the twenty-first century], *Qiu shi*, no. 18 (1997), p. 3.

socialist system, and realising the people's democracy."<sup>35</sup> At the same time, the Party reiterate "Chinese characteristics" in building a socialist legal system.

Third, according to Jiang Zemin's definition, *yi fa zhi guo*, *jianli shehuizhuyi fazhi guo* is that the vast majority people, according to the constitution and the law, under the leadership of the Party, and through a variety of ways, administer state affairs, economic and cultural matters, social affairs, in order to ensure all state affairs will be carried out in compliance with the law and gradually make socialist democracy systematic and legal, by which this system and law will not change with the change of leaders, or with their opinion and focus."<sup>36</sup> He further points out, "according to law to administer our country unifies the Party's leadership, developing socialist democracy and strictly acting in accordance with the law, thus ensures the enforcement and implementation of the Party's basic policy and line from systematic and legal areas. This ensures that the Party can all the time play the crucial leading role in controlling the full situation and co-ordinating all parties."<sup>37</sup> This definition manifests the supremacy of Party leadership in making and enforcing the law in order to let the Party master and dominate all round situations in state affairs without binding by the law.

Thus, Jiang's understanding of the rule of law is still within Deng's frame of institutionalisation and legalisation rather than emphasising restriction of Party and government power. He claimed that "Strengthening socialist legal construction and *yi fa zhi guo* are an important part of Comrade Deng Xiaoping's theory of establishing socialism with Chinese characteristics. It is also an important policy for our Party and government to administer the state and social affairs."<sup>38</sup>

Last, one more example about Party intention of the rule of law may be illustrated by its consistent suppressing of any opposition opinions. In 2001, Jiang ordered to crack down on the first opposition party, China's Democratic Party,<sup>39</sup> and he repeated the incompatibility

---

<sup>35</sup> Jiang Zemin, *ibid.*

<sup>36</sup> Jiang Zemin, *ibid.*

<sup>37</sup> Jiang Zemin, *ibid.*

<sup>38</sup> *Renmin ribao*, 9 February 1996, p. 1.

<sup>39</sup> China's Democratic Party (CDP) was founded in June 1998, and in 2001 over thirty members of the CDP were sentenced to imprisonment without public trial and due process. The same case is the "New youth Institute", which is a young scholars' group aiming to discussing political issues. The four members were detained illegally in 2001 and were refused to see their family within three years of illegal detention until November 2003 when the Supreme Court tried this case. In this trial, the four were sentenced to serve a range from 8 to 10 years in prison. In recent years, there are more crackdowns and censorship on internet speech and many net writers who published their political opinion have been arrested or sentenced for the crime of "spread to overthrow the regime" under article 105 (2) of the criminal law. This suppression has breached article 35 of the PRC constitution about the freedom of speech, which have been consistently criticised by international community and overseas Chinese scholars. For detail, there are many overseas sources available through internet. For recent reports, see Qi Yong (VOA reporter)'s interview with Xu Guang on 16 September 2004 who was a key founder of the CDP and was just set free from the prison, in *Boxun:public opinion*, 20

of Western style of separation of power, judicial independence, the supremacy of law, human rights and multiparty politics.<sup>40</sup> Such crackdown is continuing in contemporary China.

By deliberately defining the rule of law, democracy and human rights as socialist and Western while stressing socialist and Chinese characteristics, the CCP clearly shows that it will not adopt a real rule of law as many people understood in the international community, and that legal reform will be restricted within the limits of FCP and the current political structure. Like Deng, Jiang also does not allow any challenge to the CCP's legitimacy as a ruling party. Thus from the beginning, two conflicting legal principles, a law by which to rule China and a law by which to serve the Party, have coexisted throughout the reform process and resulted in dilemmas to China's legal reform.

While some legal scholars inside China debating the difference between a rule of law and rule by law through their academic activity, those outside China, especially dissidents such as Cheng Weinong, who is the chief editor of *Dangdai Zhongguo yanjiu* [Modern China studies, based in America], have criticised that the leadership deliberately used this discourse to blur the distinction of the rule by law and the rule of law, in order to continue to justify its authoritarian rule while at the same time transferring public attention from political reform to the legal field.<sup>41</sup> One thing is clear that the Party's intention is not, or is not ready for, a real rule of law; instead, law is used as a means to develop the economy and curb rampant corruption.

However, the ineffectiveness of the law in curbing ever-increasing economic crime and corruption has seriously undermined Party legitimacy and social stability. Instead of addressing the underlying reason for the cause of the weakness of law, Jiang Zemin warned about the deterioration of moral standards, the practice of worshipping money, seeking pleasure and selfish individualism, and the revival of feudal superstitions, etc. are all seriously damaging the work of both Party and government; furthermore, there is a vacuum in people's faith in socialism. He claimed that all these problems must be resolved through the promotion of ethical and cultural moralism.<sup>42</sup>

The two methods Jiang Zemin designed for the moral improvement is manifested by his idea of "three represents" [*san ge daibiao*, 三个代表] and rule of virtue [*de zhi*, 德治], which seemed to build his political legacy by filling in the basket of "Chinese

---

September 2004 ([www.peacehall.com/news/gb/china/2004/09/200409160349.shtml](http://www.peacehall.com/news/gb/china/2004/09/200409160349.shtml)), and 24 June 2004 ([www.peacehall.com/news/gb/pubvp/2004/06/200406241241.shtml](http://www.peacehall.com/news/gb/pubvp/2004/06/200406241241.shtml)).

<sup>40</sup> Jiang's speech in 2001, *Renmin ribao*, 1 February 2001, p. 1.

<sup>41</sup> For an updated report, see *VOA* report by Jiang He, 13 March 2004, in *Boxun*, 20 March 2004 ([www.peacehall.com/news/gb/china/2004/03/200403130715.shtml](http://www.peacehall.com/news/gb/china/2004/03/200403130715.shtml)).



characteristics” preached by Deng Xiaoping. The so-called three represents is that the CCP should always keep forward by representing the requirements of the developing trend of China's most advanced productive forces, the orientation of China's most advanced culture and the interests of the most majority of the Chinese people.<sup>43</sup> Since the CCP always represents the most advanced economic and cultural interests, its legitimacy as a single ruler is surely unchallengeable in the twenty-first century.

In order to meet the requirements of three represents, Jiang Zemin further advocated the rule of virtue as a supplement to the rule of law.<sup>44</sup> He considered that the law alone was inadequate to resolve various problems emerging from the rapid development, especially widespread official corruption and discreditable practices in the new market. He required Party members and government officials to govern the country through a combination of the rule of law and the rule of virtue. He pointed out that the CCP must strengthen socialist legal construction and administer the state according to the law during the process of establishing socialism with Chinese characteristics and developing a socialist market economy, while at the same time strengthening socialist moral education and the rule of virtue. The rule of law would not work well without the supplementation of the rule of virtue, and the rule of virtue would greatly enhance the rule of law.<sup>45</sup>

According to Jiang, both the rule of law and the rule of virtue are means for regulating people's thought and behaviour, and are equally important in building socialism with Chinese characteristics. The rule of virtue, as a means of establishing a socialist thought and moral system in compliance with the socialist market economy and legal system,<sup>46</sup> is part of the CCP's efforts to fill in an ideological vacuum due to plural interests arising from economic reform.

This officially advocated rule of virtue, focusing on cultivating rulers' moral qualities, has its roots in Confucian tradition resting the hope for "benevolent government" [*renzheng*, 仁政] and "sage rulers" [*mingjun or mingzhu*, 明君或明主]. A problem here

---

<sup>42</sup> "Resolutions in the CCP Central Committee Regarding Important Questions on Promoting Socialist Ethical and Cultural Program," adopted at the Sixth Session of the Fourteenth CCP Central Committee Congress, 10 October 1996, *Beijing Review*, no. 4 (October 1996), p. 22.

<sup>43</sup> Jiang Zemin defined "three represents" on 1 July at the 80<sup>th</sup> anniversary celebrations of the founding of the CCP in 2001, and on 31 May 2002, he further stressed this idea at the graduate ceremony of the Central Party School for training provincial officials. See Qiu Shi, "Zhongguo gongchandang zhizheng de jiben jinyan" [The basic experience of the CCP rule], *Xinhua wenzhai*, no. 7 (2002), p. 2.

<sup>44</sup> *Renmin ribao*, 1 February 2001, p. 1.

<sup>45</sup> Special commentator of New China News Agency, "Jianchi yi fa zhi guo he yi de zhi guo de jiben fanglüe" [Upholding the basic strategy of administering the state according to law and administering the state according to virtue], *Xinhua yuebao*, no. 3 (2001), pp. 27-28.

<sup>46</sup> The special commentator for Xinhua News Agency, "Jianchi yi fa zhi guo he yi de zhi guo de jiben fanglüe," [Insisting in basic strategy of ruling the state according to law and virtue], *Xinhua yuebao*, no. 3 (2001), pp. 27-28.

is by what and whom a virtuous official is to be defined or judged. With China under one Party rule, the judge can be none other than Party and officials themselves. This combination of law and virtue is therefore a reminder of the traditional combination of Confucian theory (the rule of virtuous men) with Legalist thinking (rule by law). This combination would undermine the efforts in legal reform, since China's legal tradition has very few links with the notion of the rule of law. The rule of virtue relies on officials' voluntary restrictions through cultivating their moral quality rather than on legal and political reform. The rule of law emphasises the authority of law while rule of virtue stresses respect for morality, and thus there is a fundamental contradictory between the two concepts. Such stress on virtuous cultivation might provide a chance of reviving China's legal tradition which itself represents a culture of rule of man. What important for China's legal modernisation is that China should concentrate on inventive introduction of Western legal concepts and practices.

The emphasis on the rule of virtue also highlights the leadership's main concern: the crisis of legitimacy facing the Party due in part to widespread corruption and local protectionism. However, the Party is reluctant, afraid or even unable, to resolve this problem. In China, it was mainly the unrestricted official power that caused the failure to implement the rule of law. As long as single Party rule remains, efforts to promote moral levels on the part of the state officials will not be effective. It is true that the use of law and morality to improve fair competition and credibility will help the operation of the market, and that officials may behave themselves better. But the most important goal is to elevate the authority of the law rather than rely on good officials. An enormous effort is now under way to make Party officials peruse Confucian classics in Party schools, and all round social sectors are required to elevate their moral standard which is decided by the Party-state based on socialist cultural programme.

The law itself will not be able to play an independent role in state administration without supportive political and cultural environment. *Minzhu* [democracy, 民主] is different from *mingzhu* [a wise ruler, 明主], although they are very similar in Chinese. Whether a socialist rule of law with Chinese characteristics can play the same role without relying on political democracy and human rights is doubtful, however much stress is given to the importance of a local context, because the current Leninist-style state make it difficult for law to rule effectively. Without a coherent theory with respect to the control of power, the elite legal ideas would be easily adjusted in the direction of the Party's actual needs, in terms of the Party's ruling position in the country. In practice, officials may find it difficult that abiding by the law while not at the same time in conflict with the supremacy of Party leadership. As Carlos Wing-Hung Lo points out, if the law were genuinely supreme, the

Party would be subordinate to law and under the supervision of the judiciary rather than the two existing in a harmonious relationship.<sup>47</sup> However, since the Party rejects the Western version of rule of law and the bourgeois notion of the supremacy of law, the conflict between the Party leadership and supremacy of law will inevitably arise.

The change of the official discourse about legal reform shows that the Party likes to strengthen its legitimacy by relying on *yi fa zhi guo* through smooth development of the market economy without reform to the political system. This shows that China's reform is a paradoxical process in the use of capitalist economic rules to enhance socialism. Ideas and ideology play an important role in China's economic reform, in order to sustain Party legitimacy.<sup>48</sup> Being constrained by FCPs, requirement of maintaining stability and the pace of economic reform, legal reform has to be carried out within the current political system, bearing "socialist" characteristics including socialist public ownership, CCP leadership party rule and its ideology. Thus a "socialist rule of law with Chinese characteristics" can only be an ideological mixture of socialism, legal tradition based on Confucian values and Legalist rule by law, and capitalism.

## (2) The concept of the rule of law: in Western and Chinese perspective

Unlike rule by law, rule of law is quite alien to China's legal culture. Rule of law is a product of Western liberal democratic philosophy. Being parallel to the German idea of *Rechtsstaat*, this concept

"Most simply expresses the idea that everyone is subject to the law, and should therefore obey it. Governments in particular are to obey law—to govern under, or in accordance with law. The rule of law thus requires constitutional government, and constitutes a shield against tyranny or arbitrary rule: political rulers and their agents (police and so on) must exercise power under legal constraints, respecting accepted constitutional limits."<sup>49</sup>

Such a concept plays an essential part in the political philosophy of liberalism, although its nature and meaning are contested and controversial. However, there are basic principles and elements featuring in the rule of law that have been widely accepted by those societies based on the rule of law. The rise of the rule of law is a major response to the rise of modern capitalism, free markets, and clearly defined and legally enforceable property rights. Max Weber's sociological analysis of law emphasised that rational rules not only

---

<sup>47</sup> Carlos Wing-Hung Lo, "Socialist Legal Theory in Deng Xiaoping's China", *Columbia Journal of Asian Law*, 11: 2 (1997), p. 481.

<sup>48</sup> Chen Feng, *Economic Transition and Political Legitimacy in Post-Mao China: Ideology and Reform* (New York: State University of New York Press, 1995), p. 2.

<sup>49</sup> Edward Craig (ed.), *Routledge Encyclopedia of Philosophy*, vol. 8: Rule of Law (New York: Routledge, 1998), p. 388.

promote predictability and thus enhance economic efficiency and contribute to economic development; they also enhance the legitimacy and authority of law in that they are more likely to be normatively acceptable to the people.<sup>50</sup>

The idea that rule of law imposes limits on the arbitrary acts of the state is also necessary for protecting the individual actors in the market, and for ensuring economic predictability and enhancing efficiency. As Andrew Altman points out, the rule of law requires both well-regulated public and private power, and political corruption may be constrained only by law and everyone should be equal before law. From a modern liberal view, he identifies two major purposes for the law to play, including an autonomous private sector with well-defined areas of freedom to prevent state intervention, and the generating and exercising of any power by the state must have legal authority.<sup>51</sup>

Peerenboom has given a detail and profound discussion of two versions of the rule of law: a "thick" theory and a "thin" theory, according to whether its specific emphasis is on formal or substantial aspects.<sup>52</sup> By studying the virtues the rule of law should have from Raz and Fuller,<sup>53</sup> he refers a thin theory of rule of law to formal or procedural justice without the influence of ideology and philosophy, focusing on features that any legal systems must possess to function effectively as a system of laws, such as a complete set of legal rules and institutions with certain restraints on official arbitrariness. The basic elements in a thin theory are that the government acts in accordance with law, as opposed to the rule of men, by limiting at least some forms of arbitrariness on the part of the government; assuring law to be predictable in order to allow people to plan their affairs and hence promote both individual freedom and economic development; and a fair mechanism for the resolution of disputes.<sup>54</sup>

However, as Raz notes,<sup>55</sup> a thin rule of law may be utilised by an authoritarian regime as an effective instrument to fulfil its own ends and suppress people. A non-democratic legal system (such as Nazi Germany) based on the denial of fundamental human rights, poverty, racial segregation, sexual discrimination, and religious persecution, may bear

---

<sup>50</sup> Max Rheinstein (ed.), *Max Weber on Law in Economy and Society* (Cambridge: Harvard University Press, 1954), Introduction, Iviii.

<sup>51</sup> Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton: Princeton University Press, 1990), pp. 22-23.

<sup>52</sup> Randall Peerenboom, "Ruling the Country in accordance with Law: Reflections on the Rule of Law in Contemporary China," *Cultural Dynamics*, 11:2 (1999), pp. 315-351. He expands this theory in his recently published book: *China's Long March towards Rule of Law* (Cambridge: Cambridge University Press, 2002).

<sup>53</sup> Joseph Raz, "The Rule of Law and its Virtues", in his book *The Authority of Law* (Oxford: Clarendon Press, 1979), pp. 210-229; Lon L Fuller, *The Morality of Law* (revised ed.) (New Haven: Yale University Press, 1969), p. 39.

<sup>54</sup> Peerenboom, 1999, pp. 316-331; 2002, introduction p. 3.

<sup>55</sup> Raz, p. 211.



better formal features required by the rule of law than the legal systems of more enlightened Western democracies.

In contrast, a thick theory of rule of law refers to substantive justice underlying a formal rule of law and also incorporating a wide range of elements such as political democracy, a free capitalist economy, and protection of human rights. It belongs to a part of the larger social and political philosophy, with broader scope than even a fully developed thin theory of the rule of law.<sup>56</sup> The International Congress of Jurists held in New Delhi in 1959 declared a thick meaning of a thick rule of law: "the function of the legislature in a free society under the rule of law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, education and cultural conditions which are essential to the full development of his personality."<sup>57</sup> This shows a universal trend for advocating the rule of law combining both procedural and substantial justice, in order to better safeguard individual rights and curb state power.

Generally speaking, the idea that the rule of law can hold state officials and even most senior officials accountable has become the key to distinguish whether the rule of law exists or not in a society. According to Peerenboom, the primary purposes of law and rule of law, varied in terms of different parties, are to constrain the arbitrary acts of the government; to facilitate and ensure economic development; to protect the individual against the state; and to provide a fair mechanism for resolving disputes. Thus he divides rule of law into four ideal types: liberal democratic rule of law, communitarian rule of law, neo-authoritarian rule of law and statist socialist rule of law.<sup>58</sup> He claims that liberals interpret protection of the individual against the state in terms of a conception of human rights that emphasises the freedom and autonomy of the individual, while others may assign less importance to individual freedom and autonomy and more to communal values or social stability, and hence draw a different balance between the rights of individuals and the needs of the state.<sup>59</sup>

In China, legal scholars have also participated in active debate about a socialist rule of law. Deng Xiaoping's pragmatism tolerated the competitive coexistence of different value systems. The theory of a socialist preliminary stage in line with market forces and the rule of

---

<sup>56</sup> Peerenboom, 2002, p. 3.

<sup>57</sup> The International Commission of Jurists (ICJ), *The Rule of Law in a Free Society: A Report on the International Conference of Jurists* [held in New Delhi, India], which is also known as *Declaration of New Delhi* (Geneva: The Commission, 1959), cited from Peerenboom, 1999, p. 316.

<sup>58</sup> Peerenboom, *China's Long March towards Rule of Law*, pp. 103-109.

<sup>59</sup> Peerenboom, "A Government of Laws: Democracy, Rule of Law and Administrative Law Reform in the PRC", *Journal of Contemporary China*, 34:12 (2003), p. 64.



law changed formal legal thinking. Although contemporary jurisprudence is still basically rooted in the speeches of his Southern Tour in 1992, there has been a remarkable breakthrough in Marxist ideology by advocating a socialist version of the rule of law with Chinese characteristics.

Since the late 1970s, China's leading scholars debated a wide range of legal topics, including (1) the nature of law: they rejected the class nature of law and acknowledged law's nature as a social regulator instead of as an instrument of class struggle; law is not only the tool of class struggle but also a social regulator; (2) the validity of current Marxist theory: it must develop according to changes in different historic periods and specific conditions; (3) the difference between the rule of man and rule of law: the latter should be the goal of China's legal modernisation;<sup>60</sup> (4) a market economy is a rule-of-law economy with an emphasis on legal rationality and rights protection; and (5) the mode, content, principles and key elements for establishing a socialist rule of law.

Before 1989, the liberal discussions of law called for limits to governmental arbitrariness and for the creation of a constitutional government. Liu Hainian noted that during the debate on the rule of men and rule of law a major point was to decide which should be supreme: the political power or the law.<sup>61</sup> Some scholars already proposed to "administer the state according to law",<sup>62</sup> while other scholars doubted this on the ground that communist literature did not provide any such discourse and ideas. In the late 1980s, some scholars had already brought forward the term "rule of law" to be the goal of the legal reform<sup>63</sup> and also stressed the difference between rule by law, rule of law and rule of man.<sup>64</sup> Shen Yuanyuan invokes the trend for favouring a combination of rule of law and rule of man during this debate and claims that this influence still exists currently among scholars and officials. Such influence comes from the long-standing political and legal tradition, the contemporary political structure, and four decades of Soviet-interpreted Marxist notions of

---

<sup>60</sup> For detail, see Zhang Jin (ed.), *Renzhi yu fazhi wenti taolun ji* [Collected papers on the rule of men and the rule of law] (Beijing: Qunzhong chubanshe, 1981).

<sup>61</sup> Liu Hainian, "Yi fa zhi guo: Zhongguo shehuizhuyi fazhi jianshe xin de lichengbei" [Administering the state according to law: new milestone of construction of China's socialist legal system], *Faxue yanjiu*, no. 3 (1996), p. 26.

<sup>62</sup> Li Buyun, Wang Dexiang and Chen Chunlong, "Lun yi fa zhi guo" [On administering the state according to law], in Zhang Jin (ed.), *Renzhi yu fazhi wenti taolun ji*, p. 180.

<sup>63</sup> Shen Zhonglin, "Fazhi, fazhi, renzhi de ciyi fenxi" [A analysis of the meaning of fazhi (rule of law), fazhi (rule by law) and renzhi (rule of man)], *Faxue yanjiu*, no. 4 (1989), p. 8.

<sup>64</sup> Wang Jiafu, Liu Hannian and Li Buyun, "Lun fazhi gaige" [A discussion of reform on the legal system], *Faxue yanjiu*, no. 2 (1989), p. 9.

law, which emphasises good leadership and instrumental function of law aiming to maintain substantial justice rather than a procedural one.<sup>65</sup>

After 1992, the topic for legal research became much broader with the expansion of legal areas in contemporary development. Pure instrumentalism and the rule of man have been criticised on the grounds that a market economy is a rule-of-law economy based on Max Weber's legal-rational ideal type; the importance of protecting individual rights and curbing official powers has been stressed. Since 1996, debates among legal scholars have intensified, with more concentration on figuring out the mode and content of the rule of law in China by taking reference from Western legal concepts and institutions. The flourishing of legal research is well manifested in "ten major hot topics in jurisprudence in 2001", which was brought forward by the *Legal Daily* and eleven other press agencies.<sup>66</sup>

After the CCP Fifteenth Congress, scholars made great efforts to control administrative discretion and maximise individual rights; in emphasising procedural justice and an independent judiciary; and in affirming the superiority of law over the Party-state. However, this discussion was more restrained than that before 1989. As Lubman notes, the proposals advanced in 1996 placed "less emphasis on the need to clarify the relationship between the Party and law, and more focus on the need to create a legal framework for the developing socialist market economy."<sup>67</sup>

The choice of China's rule-of-law model must be restricted within the above boundaries and also by traditional legal culture and values as well as the changing conditions arising from the economic reforms. Scholars have specified three aspects to "Chinese characteristics": Chinese realistic conditions (socialist preliminary stage); current features (reform and opening up); and fine cultural tradition (national features and good elements from the traditional legal system).<sup>68</sup>

In contemporary China, legal scholars are playing a limited but increasingly important role in legal development by holding lectures on legal theory for senior officials,

---

<sup>65</sup> Shen Yuanyuan, "Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform", in Karen G. Turner, *et al* (eds.) *The Limits of the rule of Law in China* (Seattle: University of Washington Press, 2000), p. 27.

<sup>66</sup> These include the enforcement of the constitution, the enactment of a comprehensive civil code, the safeguarding of human rights based on the discussion of two UN human rights conventions joined by China, the reform of the administrative litigation and state compensation systems, court reform, introducing a systematic law of evidence, Internet rules, the relationship between the WTO and China's rule of law, consumers' rights protection, and regulating the market. See *Xinhua wenzhai*, no. 4 (2002), pp. 5-8.

<sup>67</sup> Stanley Lubman, *Bird in A Cage: China's Post-Mao Legal Reform* (Stanford: Stanford University Press, 1999), p. 129.

<sup>68</sup> For example, see Zhang Wenxian, "Zai lun jiangou you Zhongguo tese de shehuizhuyi faxue" [RE-discussing the establishment of socialist jurisprudence with Chinese characteristics], *Zhongguo faxue*, no. 3 (1997), p. 23.

by advocating plural ideas about the rule of law, and by participating in the drafting process of new laws. China's institutional scholars, such as those from the Chinese Academy of Social Sciences (CASS) and law schools of top universities mainly focus on official concerns of anti-corruption and market order in carrying out their studies. As Keith and Lin observed, "They act as a professional interest group or lobby which attempts to move Party and NPC leadership in a certain legislative direction," having achieved a "qualitative conceptual breakthrough in what is admittedly a composite and uneven but surprisingly positive trend towards modern rational legal culture in China."<sup>69</sup> Yet the CCP will not permit any challenges to Marxist ideology and Party position for temporary economic growth. Besides, the imbalance in state power structure often turns the legislative process into a power-pursuing struggle while ignoring legal scholars' proposals. Thus the academic role in promoting the rule of law remains limited.

Academic debate of rule of law mainly focuses on the concept of a socialist rule of law by distinguishing rule of man and rule by law, what model of China should adopt for establishing a socialist rule of law, and the content of and key to the establishment of the rule of law.

#### A. Rule by law and rule of law

The rule by law or the rule of law [*fazhi or fazhi*, 法制或法治] is often addressed as opposed to the rule of man [*renzhi*, 人治], which refers to a leadership based on ruler's personality and will without following laws and law is used to rule ordinary people rather than the ruling elite. While rule by law, a particular Chinese discourse, literally has two meanings: the legal system and rule by laws. The two strategies of governance have belonged to the main part of China's legal tradition and political philosophy in thousands of years of China's imperial practice and the early PRC history. Chinese scholars have already rejected the rule of man, but they also disagree with the supremacy of law or the worship of law, because the law cannot decrease Party leadership.<sup>70</sup> Although these scholars already know the difference between rule by law and the rule of law,<sup>71</sup> they regard the rule of law as a series of steps

---

<sup>69</sup> Ronald C. Keith and Lin Zhiqiu, *Law and Justice in China's New Marketplace* (New York: Palgrave, 2001), pp. 245-246.

<sup>70</sup> Zheng Yongnian, "The Rule by Law versus the Rule of Law", in Wang Gungwu & Zheng Yongnian (eds.), *Reform, Legitimacy and Dilemmas: China's Politics and Society* (Singapore: Singapore University Press, 2000), p. 140.

<sup>71</sup> In June 1990, the Shanghai Academy of Social Science co-held a symposium with the Princeton University, USA, on the following topic: "Theory and practice of the rule of law in the USA". The participants concluded from this discussion that rule by law was not equal to the rule of law even if it included the 16 characters of Deng Xiaoping, but a socialist rule by law was equal to a socialist rule of law. See Zhou Yongkuan, "Yi fa zhi guo, jianshe shehuizhuyi fazhi guojia lilun yantaohui shuping"

from indicating the way to the rule of law through legalisation, rule by law or administering the country according to law and then to rule of law. They then claimed that rule by law, ruling the country according to a set of legal system by institutional authority rather than by individual leader, were moving China inevitably towards the rule of law.<sup>72</sup> They realised that rule by law was institutional and organisational, which might be manipulated by rulers in different ways, while the rule of law was to govern rulers. Under a system based on rule by law, the law is an instrument in the hands of rulers to suit them and they are not constrained by their own legal system. Limited by a prefix "socialist" ahead of the rule of law as opposed to a Western liberal democratic version of the rule of law, the Party-preached rule of law seems to have more features of rule by law rather than rule of law. However, many liberal or radical scholars have gone beyond this limit to express high expectations and enthusiasm for Jiang's formulation (of *yi fa zhi guo, jianli shehuizhuyi fazhi guo*). According to them, the ruled here in this term should be the state and its officials--not the people--and the ruler here should be the people. Who should be ruled is the fundamental difference between a rule by law and the rule of law. Thus they concluded that this formulation was the same as the rule of law in that it emphasises governing state agencies rather than the people.<sup>73</sup> Laws in these terms should be good laws that reflect social justice and common values.<sup>74</sup> This firstly requires Party members and government officials to follow the law, or the rule of law will not be successful and the legal system will go back to a traditional Legalist idea of rule by law. To restrict state power is the precondition for realising the rule of law because the rule of law is firstly a concept and consciousness regarding the authority of law, and includes individual dignity against the state.

For example, Guo Daohui, the editor-in-chief of *Chinese Jurisprudence* [中国法学] states that two points are significant for distinguishing the two concepts: whether law is supreme or whether it is used as an instrument.<sup>75</sup> This is because the law instrumentalists accept the need to strengthen the legal system but often utilise it as a tool to control society or serve class struggle. The rule of law, on the other hand, must emphasise the democratic

---

[Review of the symposium on administering the state according to law and building up a socialist country based on the rule of law], *Fazhi yu shehui fazhan*, no. 2 (1997), pp. 12-14.

<sup>72</sup> Zheng Yongnian, p. 143.

<sup>73</sup> Yu Xuede, "Fazhi haishi fazhi, zhi min haishi zhi quan: guanyu yifazhiguo wenti taolun guandian zongshu" [Rule of law or rule by law, governing the people or governing the power? a summary of debates on the issue of governing the state according to law], *Qianxian*, no. 12 (1997), p. 27.

<sup>74</sup> Yu Xuede, *ibid*; Huang Pei, "Lun 'bentu ziyuan' yu fazhi de maodun chongtu: qian tan fazhi de yuanyuan yu linian" [On conflicts between 'local resources' and rule of law: a preliminary discussion of the origin and concept of the rule of law], *Falü tushuguan on line: Falü lunwen ziliao ku* [Law library: collection of legal articles], accessed date, 11 March 2003 ([http://www.law-lib.com/lw/lw\\_view.asp?no=1430](http://www.law-lib.com/lw/lw_view.asp?no=1430)).

<sup>75</sup> Yu Xuede, p. 26.

nature of the law, requiring both the legalisation of democracy and the democratisation of the legal system. According to him, the term rule by law is not enough to draw a line between the rule of man and dictatorship, while stressing both democracy and legality in the legal system is actually different from totalitarian rule by law but close to a modern concept of the rule of law.

Li Buyun, former director of the Law Institute of the CASS, points out that the two concepts are related to each other in that both require a well-established legal system. Rule by law refers to a legal system which exists in many societies, but the existence of a well-established legal system does not necessarily mean the existence of the rule of law. He gives the Nazi German regime and the Chinese Nationalist government as examples, claiming that they both have complete legal systems but neither of them has the rule of law.<sup>76</sup>

Some liberal scholars call for the establishment of a democratic rule of law, which requires three conditions: a coherent legal system, an independent judiciary, and legal awareness among the whole people. Although the goal of the rule of law has been brought forward, the three necessary conditions is either insufficient or does not exist. Without political democracy and judicial independence, the rule of law would be nothing but empty talk.<sup>77</sup>

#### B. The model of China's rule of law

Legal reform in China is a top-down process rather than a naturally evolved one based on particular political, economic, social, and cultural contexts in favour of the rule of law. A Party-state character has also restricted the model of China's rule of law. Chinese scholars and the Party leadership all emphasise the importance of good traditional values and socialist ideology in legal development.<sup>78</sup> For example, Li Buyun stated that law should regulate at least five pairs of relationships: the law and the people, individuals and society, interest and justice, efficiency and fairness, rights and liabilities.<sup>79</sup> Legal scholars regard the process of establishing the rule of law as an unfinished goal of China's modernisation of the legal system. This internal requirement for modernisation decrees that China's legal development

---

<sup>76</sup> Yu Xuede, *ibid.*

<sup>77</sup> Guo Luoji, "Fazhi: Xianfa zhishang" [Rule of law is the supremacy of law], *Zhengming*, no. 292 (2002), pp. 71-74.

<sup>78</sup> For example, see Cheng Weili, "Jianshe shehuizhuyi fazhi guojia de jiazhi jichu", *Shehui kexue (Shanghai)*, no. 6 (1996), pp. 17-21.

<sup>79</sup> Li Buyun, "Xiandai fa de jingshen lungang," [The outline of spirit of modern law], *Xinhua wenzhai*, no. 10 (1997), p. 19; also see Li Buyun, "Shishi yi fa zhi guo zhanlue lungang" [Strategic outline of implementing the administration of the state according to law], *Xuexi yu tansuo* (Harbin), no. 3 (1999), pp. 66-72.



must be based on its national characteristics. The rule of law must be a gradual process from the top down under the CCP leadership.<sup>80</sup>

The establishment of the rule of law involves a process of absorbing positive points from China's past and borrowing market-oriented rules from the West, on the condition of maintaining socialist ideology and Party rule. Therefore, the model of a socialist rule of law is actually a question of the extent to which the legal tradition of China and the Western rule of law can be utilised. It is a question of finding a balance between localisation and globalisation. In other words, the Party must ensure that further reform will assist economic and legal progress while at the same time the outcomes from the reform will not pose a threat to its rule. Since the legal reform is a gradual and top-down process, the success of the rule of law will mainly rely on the regime's initiatives and motivations according to its own goals, ends and proposals.

Legal scholars have claimed that although the rule of law is a bourgeois concept, it is better than the rule of men and thus can be borrowed by a socialist country.<sup>81</sup> After comparing legal systems in "feudal" and "bourgeois" societies, Liu Hainian claims that none was a true rule of law, because the former was connected with dictatorship and the latter in essence serves a minority of rich people, although the latter played a progressive role in fighting against dictatorial systems and remains effective in the contemporary Western world, and he concludes that China's socialist rule of law was superior to other legal systems because a fundamental difference in a socialist rule of law is that a broad group of people, rather than a minority of rich ones, enjoys the ruling power.<sup>82</sup> He further proposed ten principles for a socialist rule of law, including socialist democracy, human rights, freedom, equality, the supremacy of law, administrative rule of law, judicial independence and fairness, restriction and supervision of power, social order, and maintaining the Party leadership.<sup>83</sup>

Li Lin insists that according to the Delhi Declaration, China's socialist rule of law should integrate values, institutions and practices, and be guided by universally accepted principles including people's sovereignty, the supremacy of law, human rights, the priority of legislation over administrative regulations, constitutionalism, exercising administrative

---

<sup>80</sup> Review of the development of legal research, in *Zhongguo falü nianjian* [The law yearbook of China] (Beijing: Zhongguo nianjian chubanshe, 2001), p. 1082.

<sup>81</sup> Guo Yunsheng and Yang Jianhua, "Lun shehuizhuyi fazhi guojia de biao zhun" [On the standards of socialist rule-of-law state], *Shanxi daxue xuebao*, no. 2 (1996), p. 6.

<sup>82</sup> Liu Hainian, "...lichengbei", p. 31.

<sup>83</sup> Liu Hainian, "Lüelun shehuizhuyi fazhi yuanze" [A brief discussion of principles of socialist rule of law], *Zhongguo faxue*, no. 1 (1998), pp. 6-9.

power according to law, and judicial independence.<sup>84</sup> In order to fulfil this, he advocates that individuals should have full development and freedom; productive forces should be set free so as to reach a highly advanced material civilisation; the market system, which is based on public ownership, should provide, to a great extent, the possibility of reducing conflict between the individuals and the society, between individuals and the state and between society and the state; the democratic political system led by the Party is the guarantee for implementing the rule of law since it reflects the majority interests of the whole people rather than a relationship between master and servant; the rule of law should develop on the condition of promoting a socialist spiritual civilisation, absorbing both traditional legal culture and worldwide common values. By doing so, there would be a harmony between democracy and centralism, individual rights and community rights, citizens' political rights and economic and cultural rights, and rights and responsibility, all of which were guarantees for a democratic political system.<sup>85</sup>

As can be seen from above, these influential Chinese scholars regarded a socialist rule of law as more democratic and advanced than any other versions. The rule of law is not a panacea for resolving any problems, since the urgent task for China is social management rather than autonomy, and the rule of law will not be built up by merely relying on political and ideological reform, while the change in local context [or indigenous resources, *bentu zhiyuan*, 本土资源] is important in building resources for the rule of law.<sup>86</sup> Some scholars considered that Western elements, such as political democracy, were not necessarily decisive in establishing the rule of law. For example, Wei Pan advocated that a consultative rule of law regime was feasible in China, in which the rule of law was supplemented by democracy instead of a democracy supplemented by a rule of law, and this is deduced from China's history, culture and existing social system.<sup>87</sup>

He stated that Western democracy was insufficient for resolving the most pressing problem facing the country: rampant corruption in all sectors, especially official corruption, which exploded in the mid-1990s and quickly conquered all levels and branches of government. The widespread corruption stems from the contradiction between China's newly

<sup>84</sup> Li Lin, "Fazhi de linian, zhidu he yunzuo" [The concept of rule of law and its institutional operations], *Falü kexue*, no. 4 (1996), p. 5.

<sup>85</sup> Li Lin, p. 4.

<sup>86</sup> Zhu Suli and Qiang Shigong, "Zhongguo xiandaihua jingcheng zhong de fazhi wenti" [Problems of the legal system during the process of China's modernisation], *Jiancha ribao*, 20 July 2001 (the first part) and 23 July 2001 (the second part), both parts can be accessed in *Jiancha ribao* website: *Zhengyi wang*, 24 August 2002, acc. 16 September 2002 ( <http://211.100.18.62/fzdt/xwar.asp?id=2071> and id=2091, respectively).

<sup>87</sup> Wei Pan, "Towards a Consultative Rule of Law Regime in China", *Journal of Contemporary China*, 34:12 (2003), pp. 3-43.

installed market system and the Party-state's unfettered power, and from economic decentralisation and local protectionism. Political corruption, if not controlled, could lead directly to the collapse of the CCP.<sup>88</sup> He claims that people are more concerned with curing corruption and guaranteeing fair market competition rather than instituting political democracy. This well suited the Party because at the fifteenth Congress it adopted direct elections at the village level, advocating developing socialist democracy, but in the year after 1997 it changed to advocating the goal of administration according to law rather than specifying a clear goal for political reform.<sup>89</sup>

Wei suggested that the rule of law rather than political democracy has become the most important means of curbing widespread moral decadence and corruption, as decided by China's actual needs. However, he exaggerated the role of the rule of law in curing all social problems. In a modern society, law is not powerful enough to deal with the ever-increasing pluralisation of social interests and problems, and moreover, if there is no democracy or only limited political freedom, the rule of law may easily be restrained by the political power. Even worse, without political democracy, a more developed rule of law would, in practice, provide a more powerful instrument for strengthening the current authoritarian regime, which would lead to rule by law rather than the rule of law.

Many scholars advocated a substantial concept for the rule of law, incorporating human rights and other thick elements of political justice. They built their arguments on the notion that a socialist market economy is a rule of law economy to advocate the protection of individual rights by maintaining a balance between efficiency and justice, and legal value in a socialist market economy should stress the efficiency of rule of law while at the same time maintaining social justice. These scholars suggest<sup>90</sup> that legal value in a planned economy manifests itself in seeking social justice by focusing on equal allocation of social resources and on realising universal harmony; while legal value in a market economy is mainly focused on individual liberation, personal independence and efficiency.

They claim<sup>91</sup> that since social interests are diversified in contemporary China, economic development would be hampered if law only emphasised justice while ignoring efficiency, and that on the other hand, there would be a big gap in income resulting from

---

<sup>88</sup> Wei Pan, pp. 3-4.

<sup>89</sup> Wei Pan, p. 4.

<sup>90</sup> For example, see Li Bing, "Falü jiazhi xiaoyi youxian lun zhiyi" [Question the theory that priority of efficiency is the value of law], *Faxue yanjiu*, no. 5 (1995), pp. 44-47.

<sup>91</sup> For a detail account of this matter, see Cai Dingjian, "Fazhi de jinghua yu Zhongguo fazhi de gaige-Zouxiang fazhi zhi lu" [Evolution of the legal system and the reform on China's legal system: towards the road of rule of law], *Zhongguo faxue*, no. 5 (1996), pp. 7-8; also see his article, "Development of the Chinese Legal system since 1979 and its Current Crisis and Transformation", *Cultural Dynamics*, 11: 2 (July 1999), pp. 135-166.



unfair allocation of wealth among social members if law only emphasised efficiency while ignoring justice. For serving all these purposes, a series of institutional arrangements are needed to build the supremacy of law and elevate the authority of the courts. At the same time, it is necessary to legalise and protect individual rights and freedom in market operation against state infringement. In order to realise social justice in contemporary China, it is necessary first to define and protect rights, and to design a set of rational procedures so as to resolve or mitigate unfair allocation of social wealth. This includes establishing a legal system of rights and responsibilities in order to ask people to be aware of both concepts at the same time, and not to infringe state and social interests, and maintaining fair economic transactions in order to guarantee a fair and orderly market and smooth social transition.

Although stress has been placed on protecting individual rights in the late 1990s, it is hard to guarantee social and judicial justice in a new marketplace, and a plural legal theory is also difficult to form when the law is associated with political and economic priorities, as Keith and Lin observe.<sup>92</sup> In contemporary China, the continuing expansion of the market economy and the complexity of social life require a new political and legal philosophy and theory as well as corresponding institutional guarantees. The growth of a market economy has led to strong autonomous and plural ownership relationship, the requirement for promise of contract, credibility and respect for personality and dignity and the desire to safeguard lawful private property rights. A market economy requires that law rather than the state play a major role, and the law not be an instrument for rulers but a rational means without being subject to individual officials or social connections. However, a socialist market economy emphasises equal and social justice, preventing the occurrence of a big gap between the poor and the rich. Market efficiency must combine with social justice. Thus, it is very important to give market actors, especially the most vulnerable and unfavoured groups, equal treatment with respect to their rights and liabilities.

When scholars appeal for elevating the authority of law and separating the state from law, they also advocate an active state to reinforce the rule of law and protect rights and freedom. They call for the establishment of a strong and stable political system and central government to carry out legal modernisation, in order to maintain social stability and order. In their view, the role of the state cannot be weakened; instead, it should be strengthened.<sup>93</sup>

---

<sup>92</sup> Keith and Lin, *Law and justice in China's New Marketplace*, p. 2.

<sup>93</sup> See Jiang Lishan, "Zhongguo fazhi gaige he fazhigua guocheng yanjiu" [A study of China's legal reform and the process of legalisation], *Zhong wai faxue*, no. 6 (1997), p.41.

Chinese scholars realise the importance of making procedural laws and rules for establishing a market economy and the rule of law.<sup>94</sup> However, few of them advocate a thin concept of the rule of law. Of the very few Chinese scholars in favour of such a concept is Liang Zhiping, who suggested that a thin concept would prevent any disagreements from arising from different political systems, ideology or morality, and was thus more likely to lead to a Weberian formal and rational legal system, in order to meet the goals of establishing a market economy and a rational government.<sup>95</sup> He said that the traditional legal system, from a formal point of view, was in compliance with the requirements of a thin rule of law if it was summarised as a set of rules and principles. According to him, a thick theory with its particular emphasis on the virtue and morality of laws is too broad, and thus would distract attention from the basic elements required for implementing the rule of law. In China, this thick theory would lead people to go back to a traditional emphasis on substantial justice while sacrificing procedural fairness, and also lead to exaggerating the ability of law to resolve all social problems.

Liang claims that a prior task for legal reform is not to revise the constitution or make more laws, as some people have suggested, but to create a favourable environment through procedural design and institutional guarantees for enforcing basic principles and rules that have already been stipulated in the constitution and laws. Although it is crucial that the state should commit itself to safeguarding human rights, this would also turn out to be a threat to the rule of law project when the latter have an increasingly powerful impact on restricting state and government actions, since the state controls all social resources and administrative power. Thus it will be more important first to build a legalised government and at the same time to foster citizens' independence from the state rather than just appeal for human rights protection. A normative concept of the rule of law is unlikely to apply to all laws and institutions in different periods and cultures. Moreover, social justice is not the only

<sup>94</sup> For example, Chen Weidong, "Zhichi chengxu gongzheng zuowei sifa gaige mubiao" [My view in support of procedural justice as the goal of judicial reform], in *Zhengyi wang*, 5 December 2002, acc. 2 January 2003 ( <http://211.100.18.62/fzdt/xwar.asp?id=8484> ); Han Yuanheng and Feng Wensheng, "Fazhi de shendu youli: quanli ruhe deyi zhiyue" [A deep concern of the rule of law: how the power can be restrained], in *Zhengyi wang*, 28 October 2002, acc. 4 December 2002 ( <http://211.100.18.62/fzdt/xwar.asp?id=8297> ); Liu Jingyou, "Jian lun chengxu bi shiti geng zhongyao" [A brief discussion that procedure is more important than substance], *Fazhi ribao*, 17 February 2002, p. 3.

<sup>95</sup> For Liang's detailed account of a thin concept of rule of law, see his article, "Fazhi: shehui zhuanxing shiqi de zhidu jiangou: dui Zhongguo falü xiandaihua yundong de yige neizai guancha" [Rule of law: institutional construction during the social transition: an internal observation of China's legal modernisation movement], *Dangdai Zhongguo yanjiu*, no. 2 (2000), 6 May 2002 ( <http://www.chinayj.net/stubarticle.asp?issue=000202&total=69#> ), pp. 1-40 (print pages).

goal of the law because in modern society law has many functions to play and it is imperative that the Chinese people should be aware of these wide functions of law.

Liang Zhiping asks to focus on law's formal and procedural features and the rule of law itself in the course of designing the model for China's rule of law project, although he admitted that such a theory could be easily used by any political system, including a totalitarian system, to serve their own goals. He highlighted the most popular features contained in a formal rule of law as a set of principles, a series of systems, a special social order, and a process of awareness. Based on these comprehensive procedures and institutional arrangements, Liang believed that people can deal rationally with all kinds of social relationships and conflicts arising from their daily lives. Such a rule of law is particularly meaningful to China, in terms of its legal tradition in the neglect of procedural justice and the current expectations for the law to resolve broad tasks.

The model of the rule of law involves absorption of both local and foreign legal culture. As for the first one, the local legal culture, scholars generally agree that, as an inner requirement for modernisation, legal reformers should take account of China's specific history, culture, tradition and environment when designing its model and setting its values.<sup>96</sup> The problem is what or how many local resources legal reformers can utilise to establish a socialist rule of law. As for the second, the question is to what extent can the legal reform borrow or transplant Western legal rules and concepts?

Some scholars suggest that the traditional legal system should be used as an important reference in building a socialist rule of law, since it contains some positive values and principles, such as the equal treatment in the like cases while different treatment for different cases; the punishment must comply with the crime; the party cannot be the judge in his own case; judges must enforce the law impartially and fairly; law must be published to the public, be clear, specific, predictable and stable, and not be retrospective.<sup>97</sup>

However, most scholars have serious doubts whether the traditional legal system would have a positive impact on contemporary legal reform, since this reform aims to transform a rule of man society into a rule of law one. These proponents acknowledged the lack of modernity in China's legal tradition for its limit in mainly emphasising maintaining social order,<sup>98</sup> and admitted the importance of transforming a traditional legal culture in order to create new behaviour and mentality, to reform social structure and to build a new

---

<sup>96</sup> See Gong Pixiang, *Dangdai zhongguo de falü geming* [Legal revolution in contemporary China] (Beijing: Falü chubanshe, 1999), p. 466.

<sup>97</sup> Liang Zhiping, 2000, p. 15; Li Jiaofa, "Fazhi jianshe lungang" [A discussion outline on the rule of law], *Xiangtan daxue xuebao*, no. 6 (1997), pp. 108-109.

<sup>98</sup> Wu Shucheng, *Zhongguo chuantong falü wenhua* [China's traditional legal culture] (Beijing: Beijing daxue chubanshe, 1994), p. 697.

social order. Liang Zhiping called for the formation of a modern legal culture through institutional arrangements and legal education by completely abandoning China's legal tradition.<sup>99</sup>

Cai Dingjian states that the modernity of a legal system, different as opposed to traditional dominance of criminal law, lies in its adoption of constitutionalism and the rule of law, with state power being strictly limited and civil and administrative laws being well-developed. The roles for the law are not only to maintain social security and facilitate economic development, but also, particularly, to ensure effective and legitimate administration, and to restrict political and government actions.<sup>100</sup> Traditional law is a series of rules for maintaining order, without regard for such concepts of modern law as human rights, private interests, freedom, equality and individual development.<sup>101</sup>

These scholars regard the legal tradition and culture as incompatible with the rule of law.<sup>102</sup> The inner conflict between China's legal culture and the rule of law is illustrated by, for example, emphasising collective rights while ignoring individual rights; worshipping authority and fearing reform; favouring harmony against disagreements; unifying regulations of all social sectors into one single code; reducing law's role while elevating morality; the individuals' weak position vis-à-vis powerful state machines. All these traditional concepts are still governing people's lives and will last for a long time. Thus they claim that merely changing law and inventing institutions can not assure the success of reform, as long as a modern concept of rule of law based on protecting individual freedom and property rights remained at its preliminary stage.<sup>103</sup>

Huang Pei studied Dicey's theory of the rule of law and concluded that the rule of law was based on Western commercial civilisation and on Christian philosophy. The local context in China, however, was of an agricultural civilisation based on Confucian philosophy and thus lacking two fundamental elements of a modern society: equality in public areas and freedom in private areas. He believes that China's local resources are totally against the concept of the rule of law, and thus a profound enlightenment for the whole society is essential to the modernisation of the Chinese legal system, as happened in Western Europe in the eighteenth century.<sup>104</sup>

---

<sup>99</sup> Liang Zhiping, 2000, p. 29.

<sup>100</sup> Cai Dingjian, 1996, pp. 7-8.

<sup>101</sup> Cai Dingjian, 1996, pp. 8-9.

<sup>102</sup> For example, see Li Youxing, "Zhongguo fazhi xiandaihua de nandian jiqi duice yanjiu" [The difficulties of and suggestions on the modernisation of Chinese legal system], *Zhejiang shehui kexue*, no. 2 (1997), pp. 73-78.

<sup>103</sup> Huang Pei, "Lun 'bentu zhiyuan' yu fazhi de maodun conggu.".

<sup>104</sup> Huang Pei, *ibid.*



Su Li claimed that China's legal tradition could only lead to the rule of man because there were more negative elements towards the rule of law than positive ones. The choice is to either respect Chinese legal tradition and restore the rule of man or to rebuild Chinese legal culture to embrace the rule of law. He said that efforts at transplanting foreign laws are mainly confined to institutional and technical areas without making proper changes to legal concepts and principles. As a result, the transplanted rules failed to fit in with China's local conditions and take root in its legal system. This failure is one of the reasons why legal constructions were rather disappointing for many scholars. This instrumental method made legal constructions stop at only institutional and technical layers without systematic change to the legal system and people's attitudes.<sup>105</sup>

Chinese scholars are worried about an instrumental method of using law. As Jiang Lishan claims, the state-dominant legal reform, on the one hand, may be effective in mobilising social resources to propel reform and correct mistakes; on the other hand, the mode of reform is also problematic because reform tends to be affected by the state's own goals and values. Over twenty years of the legal construction has witnessed how the state's ideology and values have decided this process. Party leaders see the rule of law as a way of gaining legitimacy, ensuring stability and reining in wayward local governments. There is always a possibility that the state's motivation for promoting the rule of law is suspended or distorted in certain circumstances,<sup>106</sup> for example, during "strike-hard" campaigns against crimes. In this situation, no matter how much emphasis is placed on the supremacy of law in theory and in official policy, the law in effect has never been elevated to a governing strategy.<sup>107</sup>

Jiang Lishan further notes that the motivation of the regime in promoting the rule of law comes from external pressure and challenges arising from a systematic crisis due to a backward economy and political system, once the rule of law deepens, these pressures will be released and the state will face less of a crisis, which may slow down the reformers' intentions to push reform farther. Besides, the Party-state itself is subject to reform, which comes to the most sensitive topic: political reform. Since a fundamental requirement of the rule of law is to impose meaningful constraints on the ruling elite, especially the senior

---

<sup>105</sup> Su Li, "Renzhen duidai renzhi: Weibo (Jinji yu shehui) de yige dushu biji" [Taking the rule of men seriously: a reading note on Weber's *Economy and Society*], *Falü sixiang wang: Su Li wenji* [Legal thought network: a collection of articles of Su Li], 1998, acc. 6 August 2001 (<http://mylaw.myrice.com/fali/fali-suli.htm>); for a deep account of obstacles from China's legal culture, see his book, *Fazhi jiqi bentu ziyuan* [The rule of law and local resources] (Beijing: Zhongguo zhengfa daxue chubanshe, 1996).

<sup>106</sup> Jiang Lishan, "Zhongguo fazhi daolu wenti taolun (Xia)" [A discussion of the issue of the road of China's rule of law: part 2], *Zhong wai faxue*, no. 4 (1998), p. 29.

officials, the more intensified the legal reform becomes, the more hostile the whole bureaucracy will become. Further reforms will strengthen the rule of law while at the same time diminishing Party powers. As a result, Jiang states, for maintaining power and interests, the senior leaders will be likely to adopt an ambivalent attitude about some reforms and their implication for the Party.<sup>108</sup>

Many factors contribute to China's failure to develop into a rule of law society. As Jiang Ming'an observes, some such factors come from cultural and organisational areas, and some from law-enforcing areas. He says that it is not uncommon in China that public servants ignore the law, local and departmental protectionism hampers the enforcement of state policies and laws, replacing them with local and departmental rules, and law-enforcement agencies and the courts fail to act according to law and legal procedures, or even distort law by abuse of their discretionary power. What is more, the general level of legal consciousness in the society is low, and both officials and ordinary people regard laws, courts, and the legal system as less important than the political power.<sup>109</sup> Many people generally view going to the court as just seeking personal connections [*da guansi jiushi da guanxi*, 打官司就是打关系] which accounts for more disputes being settled by informal means often involving illegal practices outside the courts than by formal means inside the courts.<sup>110</sup> Moreover, judicial corruption and miscarriage of justice occur frequently, which also prevent China from establishing a rule of law system.

### C. The content of and the key to establishing the rule of law in China

Chinese legal scholars have proposed the basic elements needed for establishing the rule of law from a wide range of perspectives. Some writers, through studying ancient and modern Western jurisprudence and reviewing China's legal tradition, state that the creation of a constitution is an utmost prerequisite for building a rule of law. They appeal for the elevation of China's constitution to a supreme position in order to establish the rule of law, viewing the essence of *yi fa zhi guo* as administering the state according to the constitution. They further advocated setting up a constitutional court to check whether governmental regulations and actions are in conflict with the constitution, and to enforce the civil and political rights

---

<sup>107</sup> Li Shuguang, "Lun yifazhiguo" [On administering the state according to law], *Gongren ribao*, 10 December 1997, p. 1.

<sup>108</sup> Jiang Lishan, p. 29-31.

<sup>109</sup> Jiang Ming'an, "Dui yi qi malasong guansi de fansi" [Reflection of a Marathon case], *Zhengyi wang*, 2 December 2002, acc. 12 December 2002 (<http://211.100.18.62/fzdt/xwar.asp?id=8473>).

<sup>110</sup> Cheng Weili, "Jianshe shehuizhuyi fazhi guojia de jiazhi jichu" [The value basis for establishing a socialist country based on the rule of law], *Shehui kexue* (Shanghai), no. 6 (1996), pp. 19.

stipulated in the constitution.<sup>111</sup> The continuing debate on the enforcement of the constitution through judicial process has been encouraged by a precedential case in 2001, which involved a citizen's successfully using the constitution to claim her education rights.<sup>112</sup>

Li Shuguang considers it particularly important to build a rights-based concept, including the full safeguarding and implementation of citizens' rights, to appeal for a consciousness of citizenship and rights, to foster the mentality that everyone is equal before the law, and to emphasise independent personality, freedom, dignity and interests. For arousing a wide awareness of rights, according to Li, it is important to regularise government actions. Traditionally, in China there was no distinction between the government and the judiciary. In this institutional arrangement, no matter how well the legal system was developed, it was in essence a rule of men, using law as a tool to control society while not acting as a means to protect individuals against the ruler. In modern times, administrative power has become even more expanded, resulting in a more difficult situation for the law to curb. This requires the restructuring of state power and the transformation of government functions according to the rule of law.<sup>113</sup>

Wang Liming emphasises the importance of making civil and commercial laws to the establishment of a legal system for the market economy. He considers that the concepts of rights-based [*quanli benwei* 权利本位], freedom of contract, and property rights, which are principles required for market operations, are very important in promoting the rule of law. He states that a complete legal system or Weberian legal-rational system cannot exist without a civil law code (which is still in the process of being drafted). In this matter, the key to building a civil and economic legal system lies in limiting administrative powers, in order

---

<sup>111</sup> See Qing Qianhong, "Yi fa zhi guo he xianfa zhishang lun" [On administering the state according to the law and the supremacy of the constitution], *Xinhua wenzhai*, no. 1 (1997), pp. 10-5; Zhou Yezhong, "Xianfa zhishang: zhongguo fazhi zhi lu de linghun" [The supremacy of the constitution: the soul of China's road to the rule of law], *Zhongguo faxue wang*, 17 June 2003, quoted in *Zhengyi wang*, 25 July 2003 (<http://211.100.18.62/fzdt/xwar.asp?id=9436>); Guo Luoji, "Fazhi: xianfa zhishang," [The rule of law is the supremacy of the constitution], *Zhengming*, p. 72.

<sup>112</sup> In 1989, Qi Yuling was admitted into a commercial college, but when the enrolment notification arrived at her high school, her teacher let Qi's friend give the notification to Qi. The latter concealed the enrolment from Qi and instead went to attend the commercial college herself. In August 2001, Qi discovered this fact, sued the former high school, the college and her friend, and sought compensation. Qi won the case according to a Reply from the SPC (Supreme People's Court) on citizens' education rights. This was the first case in which citizens' constitutional rights were enforced through judicial process in China, which aroused scholars' hopes for enforcement of the constitution. See *Zhongguo falü nianjian* [Law yearbook of China] (Beijing: Zhongguo falü nianjian chubanshe, 2002), pp. 1027-1030.

<sup>113</sup> Li Shuguang, "Lun yi fa zhi guo".

to rein in the frequent practice of official power trampling over the law in the newly emerged market.<sup>114</sup>

Some suggest that the basic preconditions for the development of a socialist rule of law, such as a market system, socialist democracy, legislative achievements and socialist spiritual civilisation, are already present.<sup>115</sup> The rule of law must reveal rights protection, procedural justice and morality, and its focus should be on the administrative rule of law.<sup>116</sup> Guo Daohui calls attention to two terms: legalisation of democracy and the democratisation of legality. He also calls for strengthening social autonomy to create a balance between state and society so that state administration and social life will become legal and democratic.<sup>117</sup>

Wang Qifu stresses that judicial fairness is the crucial element for realising the rule of law because the current severe degree of judicial corruption has hampered the enforcement of state laws and undermined the authority of law and courts. This will eventually threaten the future of the rule of law. Since China's judiciary is a part of the whole administrative system, the essential problem with judicial corruption still concerns the control of power. Judges and procurators in essence come from the same circle of state bureaucrats. Thus, the central issue for implementing the rule of law is that the Party and its government must set an example in legalising their actions, reducing interference in the judicial process, and separating the relationship between politics and law, and between government and law.<sup>118</sup>

To sum up, Chinese legal scholars view that it is very important to establish an independent and efficient judiciary, so that no state organs, social organisations or individuals may interfere in the judicial process. In order to curb state arbitrariness, it is particularly important to establish and perfect a system of judicial review and state compensation. Moreover, further reform of the judicial system is needed to improve the quality of judicial personnel and court efficiency. It is particularly crucial to build up a fair and complete procedural system in civil, criminal and administrative judicial process in order to guarantee social justice from being frequently undermined by administrative power, money and personal connections. Since judicial corruption is rampant now, building a fair and clean judiciary is crucial, because such a judiciary is a yardstick for measuring the level of democracy and rule of law in a country.

---

<sup>114</sup> Wang Liming, "Ye tan yi fa zhi guo" [Yet more remarks on administering the state according to law], *Faxue pinglun*, no. 2 (1999), p. 44.

<sup>115</sup> Liu Hainian and Liu Han, in Yu Xuede, p. 26.

<sup>116</sup> Cai Dingjian, in Yu Xuede, p. 27.

<sup>117</sup> Yu Xuede, p. 27.

<sup>118</sup> In Yu Xuede, p. 27.



Chinese scholars propose that the content of the rule of law should include a full and good system of laws, government administering according to law, an independent and fair judiciary, the ruling Party acting within the law and enforcing socialist democracy, and a great elevation of legal awareness broadly among the people.<sup>119</sup> In doing so, first, they call for a perfection of the National People's Congress (NPC) parliament system at all levels through elevating it to a supreme legislature over all other administrative lawmakers. This requires the redefinition of legislative power, procedures, legal interpretation and supervision over lawmaking. The overall aim is to make all social sectors have laws to rely on and to elevate law to supremacy in the state. The government, political parties, social organisations and individuals must all be subject to the law. Any changes to the law must be made on the basis of legal procedures.<sup>120</sup>

Among all the elements required for realising the rule of law, the key element is how to legalise the Party leadership and how to exercise the administrative power in accordance with the law [*yi fa xingzheng*, 依法行政]. The Party and its scholars have always claimed that Party leadership is harmonious with the rule of law. Cao Jianming, who has given a series of legal lectures for senior Party leaders including Jiang Zemin, claims that the CCP leadership is not in conflict with the market economy and rule of law. Moreover, the rule of law, through which Party policies are turned into laws and regulations, will improve Party legitimacy rather than weaken its leadership. He further claims that the rule of law and a long-term stability cannot be achieved without the Party leadership.<sup>121</sup> As a result, Party leadership should be strengthened rather than weakened during the reform process.

Far from all agreeing with Cao, scholars express their concern that Party leadership will undermine the supremacy of law and thus hamper the establishment of the rule of law by subjugating the law to political needs while ignoring fundamental requirements of the rule of law.<sup>122</sup> In order to realise administrative rule of law, a prerequisite task is to legalise the Party's ruling style. Party policies must be transformed into laws through legal procedures, and these policies must bear social justice, such as safeguarding human rights, prohibiting transactions between power and money, constraining official power.

---

<sup>119</sup> Guo Yunsheng and Yang Jianhua, p. 6.

<sup>120</sup> Wang Jiafu, "Yi fa zhi guo ji dai jie jue de xianshi wenti" [Realistic problems need to be resolved relating to administering the state according to law], *Liaowang*, no. 10 (1998), pp. 9-10. For a summary of recent studies by Chinese scholars on the rule of law, see Liu Baosan, "Yi fa zhi guo jin qi yanjiu shuping" [Review of recent studies on administering the state according to law], *Shehui kexue dongtai* (Wuhan), no. 12 (1996), pp. 6-10.

<sup>121</sup> Cao Jianming, "Cong fazhi dao fazhi" [From rule by law to rule of law], *Tansuo yu zhengming*, no. 12 (1997), pp. 4-6.

<sup>122</sup> Gu Yuan, "Ershi shiji Zhongguo fazhi huigu yu qianzhan yantaohui zongshu" [A summary of symposium on Looking back and ahead of China's rule of law in the twentieth century], *Zhengfa luntan*, no. 3 (2000), p. 158.

The fundamental requirements and practices for the rule of law lie in legally exercising administrative power. Administrative rule of law is essential to implementing the rule of law.<sup>123</sup> In China, according to Li Baosan, this particularly requires the leadership to cultivate and strengthen a consciousness of democracy and legality, so that they can follow the law and legal procedures while not infringing individuals' rights. In addition to perfecting institutional safeguards, there must be effective legal means to punish state agencies and officials where they have abused power and breached the law by pursuing personal gains. Thus the reform of the administrative legal system should focus on laws concerning administrative penalties, administrative redress, administrative litigation and state compensation.<sup>124</sup> Legal reform must therefore be supported by substantial political reforms if it is to succeed.<sup>125</sup>

The principles of *yi fa xingzheng*, according to Ying Songnian who is the President of the State Administrative College, is to perform administrative power according to law and not to exercise any power that is not entrusted by law. This principle also allows any subjects under the jurisdiction of the administrative agencies the right to apply for reconsideration of their cases where they consider them to be illegal. Moreover, they may even sue administrative agencies for specific actions or inactions. For any damages or harms caused by administrative agencies, the victims are entitled to state compensation according to the law by holding the relevant agencies accountable for their abuses.<sup>126</sup> Li Lin, following Wade's idea, points out that the rule of law in administrative affairs requires that administrative power should be reasonable on the basis of law, which means that all administrative actions without legal basis are prohibited, and that administrative agencies should exercise their discretion properly.<sup>127</sup>

Ying Songnian, states that exercising administrative power strictly according to law is crucial for guaranteeing the rule of law, because administrative actions greatly affect the life and interest of citizens. Moreover, if administrative agencies and their officials fail to abide by the law strictly, how can they ask people to follow laws? In China, it is not difficult to require citizens to abide by law; the real difficulty is for officials to do so. Even if the state acts for good ends, it also must be restricted within the law and bear legal responsibility for any misconduct. Since people in power often control public power, social resources, and all

---

<sup>123</sup> Ying Songnian, "Yi fa xingzheng lun gang" [A discussion of exercising administrative power according to law], *Zhongguo faxue*, no. 1 (1997), p. 32.

<sup>124</sup> Song Caifa, "Yifaxingzheng shi yifazhiguo de nandian he guanjian" [To exercise administrative power according to law is the difficult and key for administering the state according to law], *Shehuizhuyi yanjiu*, no. 1 (2000), pp. 53-55.

<sup>125</sup> Liu Baosan, "Yi fa zhi guo jinqi yanjiu...", p. 8.

<sup>126</sup> Ying Songnian, p. 29.

kinds of coercive means, it is easy for them to misuse these means to seek personal and group interests. This means that the main threat to establishing the rule of law is the abuse of public power, especially administrative power.<sup>128</sup>

According to Yu Huaining, in a market economy, the administrative rule of law emphasises that the government must pay attention to its method and scope in administering the economy, and maintaining a balance between effective interference and proper limitation. Where this balance is broken, there must be damages to both the administration and the economy. Without restriction of governmental interference, this would result in an authoritarian economy in which the government acts as both regulator and player, using its power to seek personal gains. At the same time, there would be strong resistance from the local administrations towards the central power, leading to a failure in state macro control, low efficiency and excessive budget, and widespread bureaucracy.<sup>129</sup>

As *yi fa zhi guo* does not necessarily lead to the rule of law, *yi fa xingzheng*, which only means that the government rule the country according to law, does not necessarily lead to the rule of law, either.<sup>130</sup> Thus some participants of 1996 annual conference of administrative jurisprudence<sup>131</sup> called for emphasising the principles of the rule of law in administrative legal system. This is because that in contemporary China, administrative regulations and rules, which are made by state agencies at all levels rather than by NPC legislature, occupy a substantial apportion in Chinese laws, and over 80% of laws made by the legislature also rely on administrative agencies for their implementation. The administrative power has a long-standing tradition of allowing the state to dominate over the law for fulfilling state goals. This increases the difficulty of curbing governmental discretion. There has been concern about the broad definition of China's law in which not only legislative laws but also administrative regulations are all defined as state laws. In reality the constitution and NPC laws are sometimes overshadowed by administrative regulations because of the powerful position of administrative agencies. Rules made by local Party and governmental agencies play a great role in conducting local administration, although they are frequently in conflict with the law and central policies. Many officials only pay attention to administrative regulations while ignoring the constitution and laws. In this situation, some

---

<sup>127</sup> Li Lin, "Fazhi de linian, zhidu de yunzuo", P. 6.

<sup>128</sup> Yu Xuede, "fazhi haishi fazhi....", pp. 26-28.

<sup>129</sup> Yu Huaining, "Lun shichangjingji tiaojian xia de xingzheng quanli kongzhi" [On administrative power control under the condition of market economy], *Shehuizhuyi yanjiu*, no. 2 (1999), p. 73.

<sup>130</sup> Fan Qingfang and Song Chao, "Shidai de qiangying: quanguo xingzhengfa yanjiuhui 1996 nine nianhui zongshu" [The strong voice of the times: A summary of the 1996 annual conference of the National Academic Institute of Administrative Jurisprudence], *Falü kexue* (Xi'an), no. 2 (1997), pp. 96-97.

<sup>131</sup> Ibid.

scholars suggest that it would be better to replace the term *yi fa xingzheng* with *fazhi xingzheng* or *xingzheng fazhi* (administrative rule of law, 法治行政或行政法治) by stressing the rule of law during exercising administrative power, and at the same time to correctly handle the relationship between rule of law and rule of the Party.<sup>132</sup>

### 3. Achievements, failures and the dilemmas in establishing the rule of law

Since the reform began in the late 1970s, great achievements in legal development have been made. The 1982 constitution incorporates basic principles of the rule of law such as the supremacy of the law, the equality of all before the law, the need for officials to act within the constitution and law and the rights of citizens to enjoy a wide range of freedom.<sup>133</sup> The regime has made great efforts in lawmaking and institution building as well as in popularising public legal consciousness, which have improved remarkably in the minds of both officials and ordinary people. A framework of legal system serving a market economy has emerged.<sup>134</sup>

The legal theory has also experienced a profound revolution, leading to the formation of Deng's theory on socialist democracy and legality and a socialist rule of law with Chinese characteristics. The legal mentality of the general public has changed from favouring a rule of man into a rule of law; from favouring supremacy of power into supremacy of law; from emphasising responsibility above rights into emphasising both at the same time in order to arouse a wide consciousness of rights; from only stressing law's class nature into one of increasingly emphasising its function as a social coordinator; from denying the difference between public law and private law into admitting the existence of the two concepts in order to build a concept of private law; from favouring substantial justice into emphasising the importance of both procedural and substantial justice in order to rebuild the concept of procedural values; and from relying on administrative fiats into the concept that the government acts according to law.<sup>135</sup>

In correspondence with changes in mentality and thought, practical efforts have gone into developing and improving the professionalism of the legislature, judiciary, procuracy, and the public security and legal professions. Since the fifteenth Party Congress, the regime has set a target for itself to build up a legal system with Chinese characteristics by the year

---

<sup>132</sup> Fan Qingfang and Song Chao, pp. 96-97.

<sup>133</sup> Arts. 5 and 33 of the PRC constitution.

<sup>134</sup> A working report delivered by Tian Jiyun, Vice President of the NPC, at the Fourth Session of the Eighth Congress of the NPC, *Renmin ribao*, 11 March 1997, p. 2.

<sup>135</sup> Liu Han and Li Lin, "Wo guo fazhi jianshe ershinian chengjiu yu zhanwang" [Achievements of twenty years' legal construction and prospects], *Qiushi*, no. 23 (1998), p. 12.



2010.<sup>136</sup> A series of legal lectures have been held regularly for senior politicians to equip them with basic legal knowledge, and the opinions of legal scholars have been referred to in the decision-making process. Such lectures are also held for state agencies and officials at all levels and a series of five-year plans aiming to elevate public legal awareness have also been launched since 1986.

Remarkable progress has been made in lawmaking and institution building. Contemporary China is no longer a lawless country in terms of codification of laws and regulations, and the people are enjoying a better life and freedom than any period in China's history. However, some scholars and members of the public have expressed deep discontent about the actual performance of the law. As part of the package of socialist spiritual civilisation, the law is expected to play a role in providing a legal framework for the market economy, enhancing legislative and judicial efficiency, popularising legal education among the cadres and citizenry, and attacking increasing economic crime and corruption. In China, the general debate on the rule of law is carried out with a strong political flavour and basically serves the current economic goals. In doing so, it reveals many profound theoretical problems relating to the rule of law. Both official and intellectual circles have excessive expectations for the rule of law to resolve political, economic, and social problems currently being ignored.<sup>137</sup> Thus the law has been regarded as a comprehensive panacea for curing China of all the social problems facing China; such expectations of the rule of law are too naïve to be of any help to the legal construction in China.<sup>138</sup>

From 1979 to early 2000, the NPC and its Standing Committee made 360 laws, an average of 16 per year; the State Council made 700 administrative regulations; Local Peoples' Congresses made 6,000 local laws, and Central Ministerial and Provincial governments made over 30,000 administrative regulations concerning their specific jurisdictions.<sup>139</sup> Efforts have also been made to promote the administrative rule of law and an administrative legal system designed to regulate state administrators and their conduct through legal and administrative constraints is emerging. The establishment of an administrative law system that gives individuals the right to challenge the decisions of administrative officials has been one of the most remarkable features of the post-1978 legal

---

<sup>136</sup> On 17 March 1998, the Fourth Session of the Eighth NPC Congress passed "Guomin jingji he shehui fazhan 'jiu wu' jihua he erlingyiling nian yuanjing mubiao gangyao" [The 'ninth five-year' plan for national economy and social development, and the outline for future goals to the year 2010]. *Renmin ribao*, 9 February 1996, p. 1.

<sup>137</sup> Liang Zhiping, "Fazhi: shehui zhuanxing shiqi de zhidu jiangou...", 2000, p. 1.

<sup>138</sup> Liang Zhiping notes that the term "the era of rule of law" has distracted the efforts from concentrating on legal construction itself to a wide range of expectations for law to resolve. He calls for focusing legal reform on the nature of law *per se*. *ibid*, p. 2.

reforms. The Administrative Litigation Law, the Administrative Supervision Law, the State Compensation Law and the Administrative Redress Law and the Administrative Penalties Law have gone a long way toward creating a system that holds government officials accountable for their acts, although problems remain both in the laws themselves and even more so in their execution.

The general awareness of rights is apparent from the ever-increasing litigation and participation in public affairs. People are more likely to use legal means to protect their rights and interests. From 1978 to 1988, the cases the courts accepted at a first instance increased to around 2,300,000 from 44,755. This further increased to 5,400,000 in 1998 and to 6,000,000 in 2001. Among them, administrative cases increased more than ten fold from 8,573 in 1988 to over 120,000 in 2001.<sup>140</sup> But the increase in administrative litigation is relatively low as compared to that in other kinds of cases.

The achievement in legal development is very obvious in many fields, but China is still far from being a rule of law society, as observed by both Chinese and Western scholars.<sup>141</sup> At the same time, these scholars have also shown their disappointment at outcomes of China's legal reform. In their view, China's *fazhi* (rule of law) is just rule by law rather than the genuine rule of law, although both have the same pronunciation in Chinese.<sup>142</sup> As Tony Saich says, socialist legality and Jiang's rule of law is still covering the present process of legalisation and regularisation. The fact that it was socialist legality set certain constraints and retained for the Party the major role of deciding what was, and what was not, a crime. Moreover, when Jiang and his advisors use the phrase rule of law, they do not mean a system that gives primacy to law above political consideration and Party policy. Instead, it is a way to manage power, regulate the economy and discipline society in light of rapidly changing circumstances. In this sense, while it might provide greater predictability, it is just another weapon in the arsenal of Party control.<sup>143</sup>

There is a great distance between efforts and outcomes, between expectation and reality. The rule of law is more a slogan than a practice, and law is still a tool as implementing and strengthening institutional changes, mainly economic changes, according

---

<sup>139</sup> Liu Han and Li Lin, "Wuo guo fazhi jianshe ershi nian chengjiu yu zhanwang", p. 12; also see Zhongguo renquan fazhan wushi nian, in *Law yearbook*, 2001, pp. 43-51.

<sup>140</sup> See Zhongguo renquan fazhan wushi nian, pp. 43-51; *Zhonghua renmin gongheguo tongji nianjian* [China statistical yearbook], 2002, p. 762.

<sup>141</sup> For example, see Wang Yan, *Chinese Legal Reform: The Case of Foreign Investment Law* (London: Routledge, 2002), pp. 14-24; Peerenboom, *China's Long March Towards the Rule of Law*, pp. 7-8; Lubman, *Bird in A Cage*, chapter six, pp. 138-172.

<sup>142</sup> Ronald C. Keith, *China's Struggle for the Rule of Law* (New York: St. Martin's Press, 1994), p. 1.

<sup>143</sup> Tony Saich, *Governance and Politics of China* (New York: Palgrave, 2001), pp. 126 and 125.

to predetermined policies.<sup>144</sup> Opinions as to whether the rule of law can be established or not, and whether China can become a country based on the rule of law, are varied among these scholars, so are their research methodologies. Many scholars in the West express their deep suspicions of the direction of China's legal reform, and they even conclude that China does not need rule of law while still gaining remarkable economic achievements. They believe that the slogan of rule of law is, in fact, used by the CCP as a tool to attract foreign investments, rebuild its legitimacy, and to control state power and suppress the people more effectively.<sup>145</sup>

Some optimistic scholars claim that, in spite of great difficulties, China will eventually become a rule of law state as time moves on. As Ronald Brown puts it, "perhaps just as a rose by any other name is still a rose, the question can be asked whether 'rule by law' is just another name for 'rule of law' or is it 'rule of man'?"<sup>146</sup> It should be understood, he argues, that many efforts have been made in China to build a new legal system leading to better economic co-operation, and that some basic principles of the rule of law are in place. He concludes that law with Chinese characteristics is diversity between different systems rather than an adversity, and that there is no reason to deny that law and the courts will stop to develop towards their perfection.<sup>147</sup>

Zheng Yongnian claims that rule by law is a Chinese concept also known as statist instrumentalism, which is a mixture of China's legal tradition and Soviet legal system; although law in today's China is still a tool in the hands of the CCP, it has become a more important tool in promoting economic development, maintaining social stability, reducing official arbitrariness and increasing political legitimacy. He regards the biggest difficulty for establishing the rule of law, as well as the key difference between the rule of law and rule by law, as that which officials must abide by the law in the same way as ordinary people. The difficulties mainly come from cultural, organisational and structural flaws, and moreover, the state promotes legal developments while at the same time hampering the process towards the rule of law. This can be shown in Party-state structure in the political hierarchy, the dominance of the state in the relationship between the state and the society, and the priority

---

<sup>144</sup> Edward J. Epstein, "Law and Legitimation in Post-Mao China", in Pitman Potter (ed.), *Domestic Law Reform in Post-Mao China* (New York: M. E. Sharpe, 1994), p. 19.

<sup>145</sup> For detail, see William Alford, "A Second Great Wall? China's Post-Cultural Revolution Project of Legal Construction", *Cultural Dynamics* 11:2 (July 1999), pp. 193-213; Michael W. Dowdle, "Heretical Laments: China and the Fallacies of 'Rule of Law'", *Cultural Dynamics* 11:3 (1999), pp. 287-314; Yu Xingzhong, "Legal Pragmatism in the People's Republic of China", *Journal of Chinese Law*, no. 3 (1989), pp. 29-51; William Alford, "Law, Law, What Law? Why Western Scholars of China Have Not Have More to Say about its Law", in *The Limits of China's Rule of Law*, pp. 45-64.

<sup>146</sup> Ronald C. Brown, *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics* (The Hague: Kluwer Law International, 1997), p. 133.

<sup>147</sup> Brown, *ibid*, p. 147.

of developing the economy. As a result, according to Zheng, the rule of law in China will not be decided by legal development *per se* but more importantly by China's political, economic and social structures, and the rule of law will be a long process but not impossible.<sup>148</sup>

Shen Yuanyuan believes that both China's imperial and PRC practice emphasise substantial justice more than procedural rationality. The former, which relies on good leadership, has had a strong influence on current legal reform and political structure. In the current political structure, the popularity of substantial justice over a formal one will last for a long time, which may strengthen the practice of using the law as an instrument for Party control.<sup>149</sup> Neither China's traditional history nor recent practice over twenty years has provided strong evidence that a system following principles of the rule of law will emerge in China in the near future.<sup>150</sup>

Shen Yuanyuan doubts that the legal reform is successful in "fulfilling its state goals of fostering economic reforms and building a legal system that would be granted the 'utmost high degree of authority'."<sup>151</sup> She points out the problems facing China in its legal construction: the government has not yet managed to create a legal structure that can sustain a mixed economy and many newly enacted economic laws do not serve their function well because these laws are vague and incomplete. She questions China's success in implementing the laws and more fundamentally in granting law the highest degree of authority because Party interests are in conflict with the law.<sup>152</sup> Unlike scholars inside China, Shen does not think the rule of law is the same as socialist rule of law with the Party leadership superior to law when conflicts occur between them. In this sense, any requirement for promoting democracy while asking to restrict Party leadership is regarded as attempt at promoting Western liberalism while overthrowing the regime.

The rule of law is fundamentally incompatible with socialist China because the rule of law must be established on a liberal democratic system. As William Alford points out, China's rule of law originated from its internal political dynamics with some borrowings from the West, while the concept of rule of law originated in Western economic and political systems. The Party has attempted to pursue economic reform goals without sacrificing its leadership. Thus communist ideology and Leninist state rule foreclose any hope of genuine

---

<sup>148</sup> Zheng Yongnian, "The Rule by Law versus the Rule of Law", pp. 135-136.

<sup>149</sup> Shen Yuanyuan, "Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform", pp. 35-36.

<sup>150</sup> Karen G. Turner, "Introduction: the problem of paradigms", in Karen G. Turner, et al (eds.) *The Limits of the Rule of Law in China* (Seattle: University of Washington Press, 2000), p.17.

<sup>151</sup> Shen Yuanyuan, p. 21.

<sup>152</sup> *ibid*, p. 22.



development towards the rule of law because of the rejection of the separation of powers and the supremacy of law.<sup>153</sup>

Stanley Lubman refers to China's legal reform as being the "bird in a cage" with ideological and political constraints. He prefers the term "legal institutions" to "legal system", and "legal construction" to "legal reform" in studying China's legal development, because he does not think that there is a legal system in place in China.<sup>154</sup> He claims that China's political system will become a major obstacle for the realisation of the rule of law, and thus the future of the rule of law is beyond imagination.<sup>155</sup> He also points out that the Party's wide and consistent emphasis on social stability and economic performance has resulted in annual strike-hard campaigns and ideological suppression through imposing most severe punishments on criminals and political-religious dissidents, and at the same time, arbitrary interference from the state with the development of private businesses and foreign investments without effective constraint. As the Party does not allow any challenges to its vanguard role in the country and to the dogma of the Four Cardinal Principles although they are contradictory with the rule of law, he concludes that the law will be tied up in the cage all the time until the current political system is completely abandoned.<sup>156</sup>

Western Chinese scholars particularly criticise the instrumental use of the law by the CCP to promote its own policies and to maintain stability and unity.<sup>157</sup> Chen Jianfu states that clearly it is socialist characteristics rather than Chineseness that China needs to abandon.<sup>158</sup> He points out that law in contemporary China is fundamentally used as a tool for social engineering as desired and perceived by the Party. Such pragmatic use of law under Deng's leadership fell well within the notion of rule by law but not the rule of law. Moreover, Jiang's 1997 report hardly discussed democratisation, political reform and human rights protection, although Chinese scholars' discussion seems to suggest that China under Deng was a country under the rule by law and the present China under the third generation of CCP leaders with Jiang as its core [CCP jargon] is moving towards a rule of law.<sup>159</sup> His report is

---

<sup>153</sup> William P. Alford, "A Second Great Wall?....," pp. 198-199.

<sup>154</sup> Lubman, 1999, introduction; also see William Alford, "Law, Law, What Law? Why Western Scholars of China Have Not Had More to Say about its Law", pp. 45-64.

<sup>155</sup> Stanley Lubman, *China's Legal Reforms* (New York: Oxford University Press, 1996), introduction, p. 1.

<sup>156</sup> Lubman, 1999, introduction, p. 2.

<sup>157</sup> Yu Xingzhong, "Legal Pragmatism in the PRC", *Journal of Chinese Law*, no. 3 (1989), pp. 29-51; Pitman Potter, *The Chinese Legal system: Globalisation and Local Legal Culture* (London: Routledge, 2001), introduction; Jianfu Chen, "Market Economy and the Internationalisation of Civil and Commercial Law in the PRC", in Kanishka Jayasuriya (ed.) *Law, Capitalism and Power in Asia: the Rule of Law and Legal Institutions* (London: Routledge, 1999), pp. 69-86.

<sup>158</sup> Jianfu Chen, *Chinese Law: towards an understanding of Chinese law, Its Nature and Development* (The Hague: Kluwer Law International, 1999), p. 361.

<sup>159</sup> Chen Jianfu, *ibid*, pp. 361-363.

continuing to talk about rule by law, not rule of law, and thus China remains a country based on rule by law, not rule of law.<sup>160</sup>

Ronald Keith examines China's struggle to find a balance between efficiency and justice in a new marketplace while developing a new legal theory in China, finding that the emphasis on efficiency in a market economy has led to sacrifice of individual rights and interests, and has also caused imbalance between efficiency and justice. This stress on efficiency often fails to bring about social and judicial justice, since during economic reform social and judicial justice has been deliberately associated with politically emphasised efficiency in a marketplace, while the virtue of the rule of law *per se* is ignored.<sup>161</sup>

Randall Peerenboom suggests that it will be better to assess China's legal development based on a thin theory of the rule of law, which focused on formal and procedural progress based on China's conditions, rather than target human rights and political democracy based on a Western liberal democratic version of the rule of law.<sup>162</sup> However, although the Party seems to be able to accept certain constraints for more effectively enforcing its policy and state unity, as long as the law is not becoming a threat to Party interests, China continues to endorse an instrumental rule by law, since the Party has an ambivalent attitude toward law and in particular the desire to retain ultimate authority over the system. Thus he states that the future of the rule of law is dependent on the intention and commitment of the Party in that whether the rule of law can obtain sufficient authority to impose meaningful constraints on the state and its officials, especially senior officials.<sup>163</sup> He reminds one of the difficulties in a single Party state in controlling and allocating political and administrative powers, since in such a system, power's control must either depend on the Party's voluntary or forced relinquishment of some of its power.<sup>164</sup> In today's China, he concludes, the Party continues to impose its influence on or interfere with the legislature and courts, denies citizens many of their civil and political rights, and adopts harsh suppression of ideological dissidents, any autonomous organisations, and especially opposition political opinions on the internet. All these practices have resulted in the failure of China's legal reform to attain even a thin rule of law.<sup>165</sup>

---

<sup>160</sup> Chen Jianfu, *ibid*, p. 363.

<sup>161</sup> Keith & Lin, *Law and Justice in China's New Marketplace*, p. 1.

<sup>162</sup> Peerenboom, *China's Long March towards the Rule of Law*, introduction, p. 5.

<sup>163</sup> Peerenboom, *ibid*, pp. 10-11.

<sup>164</sup> Peerenboom, "A Government of Laws: democracy, rule of law and administrative law reform in the PRC", p. 60.

<sup>165</sup> Peerenboom, "Ruling the Country in accordance with law...", p. 324.

As can be seen from the above-mentioned discussion of the legal reform in China, the favourable conditions for realising the rule of law, such as a free democratic polity, a free market economy and a robust civil society, do not come into being in contemporary China.<sup>166</sup> The emerging socialist market economy remains dominated by public ownership and relies on the state to play an active role. Moreover, an authoritarian government, which builds its legitimacy mainly on economic performance without political democracy, will not allow any challenges to this status quo. The law is still a major tool for fulfilling Party goals and the rule of law is dependent on the pace of market development. Whenever the Party-state feels necessary, it will interfere in the economy. In practice, local governmental agencies have formed a strong affiliation with businesses within their jurisdiction. Governmental direct or indirect interest in the market has made local governments meddle frequently in enterprises' operation and control of important industries. Such a market is not supportive of the rule of law.

In addition to the lack of political democracy and a free market, the third condition for establishing the rule of law, namely a robust civil society, has not come into being. To date, the leadership consistently represses any independent social organisations. In order to maintain its rule, the CCP continues to emphasise social stability, collective rights above the individual rights, and a socialist spiritual civilisation. It controls the huge bureaucracy by a cadre appointment system while the judiciary and judges are also subject to Party leadership. The media, the legislature and governmental watchdogs are all subject to the Party. In this situation, the whole society is under the close surveillance of the Party and its security organs. In this sense, China remains a police state. An independent civil society will be regarded as a threat to Party dictatorship and must be suppressed. The harsh crackdown on the Falungong cult and the continued attacks on unregistered Christian groups and political dissidents have revealed the powerful control of the state over society. In recent years with the internet widely accessible to the public, the regime has expanded its censorship and suppression to opinions and debates that are published on the internet.

It is true that China's society is becoming more plural and autonomous than before, but this pluralisation of social interests has not brought about an independent society in

---

<sup>166</sup> As what basic elements or indicators needed for building the rule of law, someone may raise different opinion. However, these conditions listed above in the text are classic and essential, and at least they have close interaction to each other in facilitating the establishment of the rule of law. The rule of law may not reach its ideal or get perfection in even most developed democratic countries in nowadays, neither the democracy and market economy. But such less perfection does not mean that the rule of law is not necessarily a prerequisite for building a socialist market economy, or that the establishment of the rule of law does not necessarily require wide political democracy in China. Some may also claim that these mutual conditions are decided by men rather than a truth, and thus they are

China capable of balancing state power. What has formed in the new market economy is not a middle business class as in the West, but a corporatism in which enterprises and businesses have formed a close affiliation to local governments, in order to obtain scarce resources, loans, and administrative protection. Local administrations also benefit considerably from this link to local revenues and officials' incomes. The market reform is fostering an economy linked to political power. In this situation, the emerging business group is unwilling and unable to challenge the state to introduce a freer and more democratic political system. They may be concerned with property rights and certain civil and political rights, but will not challenge one-Party rule. In the near future, therefore, a form of socialist state corporatism that serves the interests of the state and the elite is a more likely result of economic reform in China than democracy.

The Party-state interests put the legal reform in a dilemma as the CCP and its ideology will be brought into an ever-intensifying conflict with legal development. Since 1990, the regime has been facing more and more conflicts between pragmatic economic policy and orthodox ideology, planned economy and market mechanism; central control and local autonomy, maintaining stability and appealing for political democracy, and an open-door policy and fear of Western influence.<sup>167</sup> Besides, the CCP is also confronted with a number of internal problems or challenges: the growing gap between quality of life in urban and rural areas, increasing crime, rampant corruption, and spiritual emptiness from a loss of faith in communist ideals combined with state policies against organised religion. The re-emergence of superstition in rural areas, rural rebellion, and the heavy reliance on personal social networks are all fighting against various incentive systems introduced by the reform. All these in turn reinforce the ideological vacuum and the individual pursuit of material gains.<sup>168</sup>

If reform is to succeed, communism and the Party and whatever is left of the FCP must go, and the PRC leaders cannot have things both ways at once.<sup>169</sup> "The communist leadership stands at a crossroads. To rectify the structural imbalance and improve efficiency, more reform measures must be undertaken and the operation of the economy must rely on the market. Moreover, to attract foreign capital and technology, the open-door policy must be strengthened and the investment environment improved. Laws must be passed to curb the

---

unreliable. However, these conditions and their interactions have been proved by social development in the world to be existed better workable model than their flaws.

<sup>167</sup> Zheng Shiping, *Party vs. State in Post-1949 China: the Institutional Dilemma* (Cambridge: Cambridge University Press, 1997), pp. 278-279.

<sup>168</sup> Joseph Y. S. Cheng (ed.), *China: Modernisation in the 1980s* (Hong Kong: the Chinese University Press, 1989), introduction, p. xiii.



spread of corruption and speculation, and the political structure must be revamped. All of these moves threaten to undermine the foundations of the one-Party dictatorship and make the 'FCP' meaningless."<sup>170</sup>

#### 4. Introduction to the thesis

The concept of the rule of law is a controversial issue in present China, and there are many contradictions and confusions. It is too early to predict the future of China's legal reform, but a clear idea of China's legal environment *status quo* will deepen our understanding of the nature and content of the legal reform taking place in China. The control of Party and state power under the law is crucial to establishing the rule of law system, and it is therefore a key criterion by which to differentiate the rule of law from rule by law. Within the current political framework, however, it is hard to categorise China, a socialist country based on the rule of law with Chinese characteristics, as a rule-of-law state as understood in the Western context. In practice, the present legal system is used more as a powerful instrument by the Party-state to reach its goals than to bring the Party-state power under control.

With all these in mind, I will explore in this thesis Chinese political, economic and cultural contexts in which the legal reform is carried out, and trace legal development from 1978 to date mainly in the areas of restriction of governmental arbitrariness and protection of rights. Case studies will go hand in hand with discussion and analysis of laws and regulations concerned, with a focus on: (1) whether the constitution and law can effectively check and balance the state power, and protect human rights and property rights; (2) whether there is a legal culture in current Chinese society to favour the implementation of the rule of law.

Thus there are seven chapters in this thesis. The first one serves as an introduction to the background of China's legal construction, Chinese and Western theories and comments on legal reform and legal development, and conflicts between the rule of law and Party leadership. The second chapter concentrates on China's administrative legal regime, the most chaotic and contradictory area in China's legal system. The following two chapters will be devoted to case studies of the Party-state frequently infringing fundamental human rights, including personal freedom and property rights of citizens and enterprises in the name of the state or public interests.

Chapter Five will examine the status of the Chinese judiciary under the PRC political structure to show its weakness and inability in reigning Party-state arbitrariness, in

---

<sup>169</sup> Bih-Jaw Lin and James T. Myers (eds.), *Forces for Change in Contemporary China* (Columbia: University of South Carolina Press, 1993), p. 119.

<sup>170</sup> *Ibid.*, p. 281.

safeguarding the rights and interests of the individual and company, and in resolving social disputes. The sixth chapter will explore non-political elements in China's legal reform by looking at Chinese legal tradition and culture, and the influence of these elements upon ordinary Chinese people in their attitude towards official power, laws, courts, and lawyers, which have proven to be a serious obstacle to the rule of law.

The last chapter acts as a conclusion. As previously stated, it is too early to foretell whether China will be able to establish the rule of law system as this system is universally understood. I will not close with any predictions about the fate of legal reform in China. Rather, I will make an evaluation of the nature and content of China's legal reform based on case studies within the present legal framework.

## Chapter Two: China's Administrative Law and Limits

The Chinese term “*Yi fa xing zheng*” [依法行政] means “exercising administrative power according to law.” *Yi fa xingzheng* requires the government to act according to law, and without it, the rule of law cannot but be empty talk. According to A. V. Dicey and F. A. Hayek, an autonomous legal order requires two conditions: law as a restraint to government, and law as formal and procedural justice.<sup>1</sup> In order to satisfy these conditions, the government must be restricted by rules so that people can predict the consequences of state management and then make their own choices and decisions; in this way, people are only subject to the law rather than to the government while officials are restrained by the rules known to the public. Thus it is crucial to build up an effective administrative legal system according to the principles of the rule of law.

In China, administrative power has penetrated into all aspects of people's life, and administrative fiats have long been used as main management methods. The administrative power is superior to the law and the judiciary. Thus, whether state agencies and their officials can perform their duties legally determines the fulfilment of judicial fairness, right protection, market success and the rule of law. The CCP has called for efforts to speed up the transfer of government functions and encourage all-round administration according to law, in order to build a clean, diligent, pragmatic and efficient government.<sup>2</sup> Correspondingly, a series of laws and regulations have been made to control administrative arbitrariness, and at the same time to empower individuals and social organisations to challenge the legality of governmental actions. An administrative legal framework in China is emerging and the governments at all levels have made remarkable progress in lawmaking and enforcement in recent years.

However, much more work still need to be done for meeting requirements of the rule of law. Problems in China's administrative law such as conflict and vagueness in administrative legislation and regulation are serious, leading to confusion in the implementation and interpretation of these laws and regulations. Meanwhile, the legal means for controlling state agencies and officials, especially judicial review, is far too insufficient

---

<sup>1</sup> A. V. Dicey, *Introduction to the Study of Law of Constitution* (London: Macmillan, 1959 and reprinted in 1975), the tenth edi., pp. 202-203; F. A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944), p. 154.

<sup>2</sup> *People's Daily* (online in English version), 16 September 2002, 1 January 2003 (<http://english.peopledaily.com.cn/200209/16>).

to hold them accountable for rampant abuses. Legal procedures for restricting governmental actions remain underdeveloped and fragmentary.

### 1. Unfettered administrative power in lawmaking process

The term "administrative law" is used to describe the legal regime governing public authorities, including legislative, executive and judicial powers.<sup>3</sup> Among the three powers, the administrative power is the most powerful and ever-expanding one. Today, administrative agencies not only enforce laws and regulations but also make regulations and exercise adjudicating power in a wide range of areas.

In China, administrative regulations and rules play a major role in state governance. The highest authority of the NPC in lawmaking is overshadowed by powerful and expanding administrative power. According to the PRC constitution, the NPC and its Standing Committee (SC) are the highest legislative authorities and have the power to make and revise the constitution and state "basic laws" [*ji ben fa*, 基本法], to interpret the constitution and laws, and to make or revise "ordinary laws" [*qi ta fa*, 其它法].<sup>4</sup> The provincial, municipal and county People's Congresses can make regional legislation [*difang fagui*, 地方法规] within their jurisdictions.

Compared with the NPC and its SC, the State Council (China's supreme administrative agency) enjoys a wider legislative power. According to the constitution, it may enact "administrative measures" [*xingzheng cuoshi*, 行政措施], "administrative laws and regulations" [*xingzheng fagui*, 行政法规] as well as "temporary stipulations" [*zhan xing guiding*]." It may also recommend a motion to the NPC and its SC or issue particulars for enforcing national laws.<sup>5</sup> In addition, the State Council also has the authority, granted by the NPC, to promulgate "empowered legislation" [*shouquan lifa*, 授权立法] and "quasi-laws" [*zhun lifa*, 准立法] during the period of economic reforms.<sup>6</sup> Under the State Council, its numerous central ministries and commissions have the power to make departmental

---

<sup>3</sup> C.T.Emery and B. Smythe, *Judicial Review: Legal Limits of Official Power* (London: Sweet and Maxwell, 1986), Introduction, p. 3.

<sup>4</sup> Arts. 58; 62 (1) (2) (3); 67 (1) (2) (3) (4) of the PRC constitution.

<sup>5</sup> Art. 89 (1) (2) of the constitution.

<sup>6</sup> See "Quanguo renmin daibiao dahui changwu weiyuanhui guanyu jiaqiang falü jieshi gongzuo de jueyi" [Resolution concerning strengthening the work of law interpretation], issued on 10 June 1981, in *Falü huibian*, p. 274-275.



regulations [*bumen guizhang*, 部门规章],<sup>7</sup> and regional governments at all levels have the power to make local regulations and rules [*difang zhengfu guizhang*, 地方政府规章].<sup>8</sup>

Under this lawmaking mechanism, the administrative law in China has a wide range of sources and multi-layer of authority. It is natural that, with the rapid pace of the economic reform, confusion and conflicts among state agencies in relation to making and implementing regulations frequently happen.<sup>9</sup>

In China, the making of administrative regulations and rules is mainly carried out to enforce Party current policies. As China is ruled by one political party, all state agencies including legislature and judiciary are subject to the Party leadership and must carry out its policies which are manifested in various forms, such as laws, regulations, directives and normative documents (*guifanxing wenjian*, 规范性文件). The Constitution requires all organisations, including all political parties, to obey the law,<sup>10</sup> but at the same time, it affirms the Party supreme leadership in all round state affairs to be the cardinal principle of the FCP.<sup>11</sup> Thus, Party leadership in lawmaking, especially lawmaking regarding state administration, is beyond challenge.<sup>12</sup> Only when Party policies have been proven effective and reasonable in practice may they be legalised. Thus the lawmaking process is not an independent arising one out of the need of legal development itself but one that arising from political needs.

As Perry Keller notes, "The Party leadership is consequently the ultimate source of all legislation, regardless of its content, form or the institution through which it is issued."<sup>13</sup> In practice, Party instructions and normative documents are issued at various levels of authorities and cover all round areas, in order to implement the Party's economic, political and cultural policies. Provincial and county Party Committees, based on the policies of the

---

<sup>7</sup> Art. 90 of the constitution.

<sup>8</sup> "Difang geji renmin daibiao dahui he geji renmin zhengfu zuzhi fa" [The Organic Laws of the Local People's Congresses and Local People's Governments at all Levels] (promulgated on 1 July 1979 at the Second Session of the Fifth Congress of the NPC), arts. 27, 35 (1); in *huibian*, pp. 64, 66.

<sup>9</sup> For discussions of conflict and disorder in China's law system, see Ge Wenxiu, "Wo guo xingzhengfa muqian cunzai de wu da wenti ji duice" [Five major problems of administrative law in current China and the solutions], *Dong Jiang xuekan*, no. 3 (2000), pp. 104-108. Other comments, for example, see Perry Keller, "Sources of Order in Chinese Law", *The American Journal of Comparative Law*, vol. 42 (1994), pp. 711-759.

<sup>10</sup> Art. 5 of the constitution.

<sup>11</sup> Preamble of the Constitution.

<sup>12</sup> In the 1980s, some members in the NPC attempted to point out the conflict between the Party leadership and the NPC supreme legislative authority. Peng Zhen, the then Chairman of the NPC, clarified that upholding the Party leadership in legislative work was absolutely beyond challenge because legal reform was to strengthen and improve Party leadership rather than to weaken it. Since then, this topic has been left untouched at least in official circle.

<sup>13</sup> Perry Keller, "Sources of Order in Chinese Law," *The American Journal of Comparative Law*, vol. 42 (1994), p. 738.

Central Party Committee, play a substantial role in guiding policy within their own jurisdictions. Administrative normative documents come in various forms, such as decisions, orders, and instructions. Sometimes these powerful instructions are only a note or a telephone from some officials. In practice, the order among all laws and regulations in terms of their authority is as follows: the law is often subject to political and administrative power; administrative laws [approved by the NPC] and regulations are superior to NPC-made laws; administrative regulations are more powerful than administrative laws; normative documents are treated with more respect than administrative regulations; and notes and orders from superiors are more effective than normative documents.

The dominance of administrative regulations in state administration may be shown from statistics relating lawmaking between the legislative agencies and administrative agencies during the period from 1979 to April 2000. The State Council made 891 administrative regulations and rules during this period, while at the same time the NPC only made 185 laws. Over this period, the State Council made 142 regulations while the NPC made 41 laws throughout its whole fifth session; during sixth session of the NPC, the former made 258 while the latter made 47; during the seventh session, the former made 201 while the latter made 60; during the eighth session the former made 241 and the latter made 85.<sup>14</sup> The administrative control has been also expanded to regulate many civil areas, such as housing management, road accidents, and medical negligence.<sup>15</sup>

The most chaotic situation occurs when local or departmental agencies enjoy the power to make local rules or administrative normative documents. For example, in a process of rectifying administrative regulations and rules, Zhejiang provincial government alone issued 261 decisions and orders between December in 1993 and November in 1994, and between December in 1998 and November in 2000.<sup>16</sup> Illegal practices were full of the making process of these regulations and rules or of their contents, such as infringing private rights and interests, monopolising the decision-making process, and low transparency of the procedures.

The decentralisation during the economic reform has given rise to local protectionism or localism [*difang baohuzhuyi*, 地方保护主义] and departmental protectionism [*bumen baohuzhuyi*, 部门保护主义]. Localism refers to local government and its functional agencies or national departments utilising their administrative power to restrict

---

<sup>14</sup> Wang Baoming, "Zhongguo xingzheng lifa pingshu" [Review of China's administrative legislation], *Guojia xingzheng xueyuan xuebao*, no. 4 (2000), p. 69.

<sup>15</sup> Huang Long, "Xingzheng lifa de minshi zhiyue wenti" [The problem of civil restriction of administrative legislation], *Fazhi ribao*, 4 February 2002.

or discriminate fair competition from outside regions, by restricting outside businesses entering into their regional market or preventing local enterprises and their capital from flowing out.<sup>17</sup> In essence, this practice is an abuse of administrative power. As a result, market competition is sacrificed to the pursuit of local or departmental interests.

In some circumstances, China's regional governments employ local regulations as a means of resisting central policies and laws. These administrative agencies wield their lawmaking powers to protect or increase their jurisdictions and to advance their own policies. Their lawmaking power becomes a means of allocating interests or even protecting huge profits at the expense of social justice and public interests. Such abuse of legislative power in pursuing local or departmental interests will result in legislative corruption in that these lawmakers may smuggle inactive or bad laws and even evil laws into legislation. This is a waste of legislative resources and an invisible corruption of power which is latent and therefore more dangerous than judicial corruption.<sup>18</sup>

Li Buyun, who participated in drafting the PRC Legislative Law, notes that the attitude of lawmaking participants towards legislation reveals the intention to promote departmental interests, these departments only considering their own benefit and expansion, often ignoring "the reasonable distribution of benefits and the reasonable allocation of authority."<sup>19</sup> As local governments increase their control over their own economic resources, they not only resist central policy and national law, but also make more regulations within their jurisdiction. As a result, there are inevitably bargains and negotiations between different departments and regions, which have caused chaos in a newly established administrative law system. In this lawmaking mechanism, the process of lawmaking will be slow and time-consuming, and policy differences are resolved through near endless lobbying,

---

<sup>16</sup> *Xingzhengfa luntan* [Forum of administrative law], acc. 4 June 2002

(<http://www.1488.com.cn/bbs/showannounce.asp?id=358875&boardid=27&page=1>).

<sup>17</sup> For the definition, see He Yourong, "Difangzhuyi de chengying, weihai jiqi duice" [The reason, harm and solution of local protectionism], *Xinhua wenzhai*, no. 2 (2002), p. 193.

<sup>18</sup> For example, during drafting the Criminal Procedural Law, the amount of time for the defence lawyer to be involved in the investigation was compromised to a time after the first interrogation began, because of the Public Security Bureau's powerful resistance. Again, the Administrative Litigation Law (ALL) limited the jurisdiction of a case involving a county-level government agency to be ruled by the courts at above county level, which showed the intention of administrative drafters to maintain the authority's self-interest and reputation. See article 14 (3) of the ALL and article 8 of the Supreme People's Court's interpretation to the enforcement of the ALL. On the other hand, however, the civil code has not yet been published because it does not concern the interests of any agencies.

<sup>19</sup> Li Buyun, "Guanyu qicao 'Zhonghua renmin gongheguo lifa fa (zhuanjia jianyi gao)' de ruogan wenti" [On several issues concerning the drafting of 'PRC Legislative Law (Draft of expert recommendations)'], *ZhongGuo faxue*, no. 1 (1997), p. 14.





compromise, consultation, and negotiation for alternatives acceptable to many organisations.<sup>20</sup>

It frequently happens that two agencies fight for jurisdiction over granting the same licence, such as setting up new petroleum stations or issuing taxi licences. The chaotic situation in lawmaking causes confusion among the enforcing agencies and personnel, especially when a national law is in conflict with a local regulation, or when a particular regulation comes into conflict with a particular policy, as shown in the case of Wang Kaifeng, which aroused the attention of jurists concerned with the legislative conflict between a national law and a local normative document.

Wang Kaifeng, head of the fiscal bureau of a county under Changle city, Fujian province, between 1995 and 1999, provided financial guarantees for enterprises in support of their application for loans, known as financial turnover capital, from Changle municipal financial bureau. The Party committee of Changle issued a normative document, in which the lower financial branches were required to provide a guarantee for enterprises within their own jurisdiction when they applied for such a loan from the Changle municipal financial bureau. But the Security Law of the PRC prohibits any state agencies from providing guarantees for any businesses. Nearly seven and half million *yuan* of loans could not be collected because these enterprises went out of business. Thus, Wang was arrested for negligence and was sentenced to five years and six months of imprisonment.<sup>21</sup>

It is clear that Wang Kaifeng became a scapegoat for China's self-conflicting legislative system. Wang, a governmental official, was required to perform two duties: to obey instructions from local Party Committee and to obey the state law. Whichever duty he performed, he eventually has to take responsibility for either disobeying his superior order or the state law.

In practice, it is the higher Party Committee that checks the lower Party committee's documents. Local governments usually do not take national laws as a guide. Instead, they follow local Party and governmental regulations. Besides, laws and regulations are so general and ambiguous that officials find it difficult to follow when dealing with practical issues. In some areas, there are no laws at all for them to follow, which leaves them nothing to rely on except Party policies and instructions. Bureaucrats enjoy enormous discretion in implementing laws and administrative rules due to the overlapping authority of lawmaking and the excessive administrative power. There is no single institution strong enough to

---

<sup>20</sup> Murry Scot Tanner, "How a Bill Becomes a Law in China: Stages and Processes in Lawmaking," in Stanley Lubman (ed.), *China's Legal Reforms*, 1996, pp. 40-41.

<sup>21</sup> See "Zhengce he falü dajia, zhixing zhengce de cheng tizuiyang" [Policy conflicts with the law while the policy-enforcer becomes a scapegoat], *Beijing Qingnian bao*, 25 January 2002, p. 2.



preserve the coherence of laws and regulations at different levels. Whereas, due to CCP's experimental approach toward reform, more subordinate regulations to implement experimental reforms will be enacted, resulting in further disruption to the order of laws.

Moreover, China has no constitutional court to review government regulations and policies even if they are in conflict with the constitution. Again, PRC courts have no power to repeal an illegal administrative regulation. Although the Administrative Litigation Law (ALL) allows compensation for certain illegal governmental action, it does not empower the courts to reject administrative regulations or rules that are illegal or in conflict with another law. Since instructions from superiors are treated with more respect than laws in China and also there is no effective means to constrain administrative power, the abuse of such power will be widespread and the law will be an infant.

Due to the unclear allocation of lawmaking powers and the disorder in the origins of law, confusion often arises as to who makes the law and who has the authority to interpret it. Administrative agencies from the central to regional levels may interpret their own regulations. Although the constitution grants the Standing Committee of the NPC the power to interpret the Constitution and statutes, it has not formally exercised the power of constitutional interpretation because the constitution is not made for enforcement. It has no power to interpret administrative regulations but only legislative laws. Moreover, its legislative interpretation is not more than a reference for administrative agencies' consideration during adapting these general rules into their regulation-making process rather than direct enforcement.

At the same time, the Supreme People's Court (SPC) has no constitutional power to interpret laws. With more and more lawsuits arising from economic reforms, the SPC has been playing a more important role in interpreting legislation and regulations during the judicial process, but its interpretation is restricted to only "questions involving the specific application of laws and regulations in adjudication works,"<sup>22</sup> and is only valid within the judicial system and its cases may not be cited as a precedence by lower level courts in their formal judgements.<sup>23</sup> All other Chinese courts are prohibited from expressing any formal opinion on the meaning of legislative language.<sup>24</sup>

---

<sup>22</sup> Art. 33 of the Organic Law of the PRC Courts, in *huibian*, p. 88.

<sup>23</sup> "Guanyu renmin fayuan zhizuo falü wenshu ruhe yinyong falü guifanxing wenjian de pifu" [Reply to the treatment of legal normative documents in the formulation of legal documents by the people's courts], *Zhonghua renmin gongheguo zui gao renmin fayuan gongbao*, no. 3 (1986), p. 25.

<sup>24</sup> "Guanyu difang geji fayuan buyi zhiding sifa jieshi xingzhi wenjian de pifu" [Reply to the inadvisability of regional people's courts formulating documents which resemble judicial interpretations], *Zhonghua renmin gongheguo zui gao renmin fayuan gongbao* no. 2 (1987), p. 19.

In contrast, the State Council enjoys great power with the interpretation of almost all laws and administrative rules.<sup>25</sup> Its numerous ministries and commissions also have the power to interpret their own regulations and rules. As legislation continues to expand during an increasingly complex economy, the institutional disorder in legislature and interpretation will continue to give rise to confusion in legal development, which could seriously undermine the pace of economic reform.<sup>26</sup> At the same time, the intention of legislature in this complicated system will be easily distorted in the course of factional and institutional struggle. As Keller notes, the immediate response of China's lawmaking system to political and institutional pressures has inevitably generated ambiguous and inconsistent situation in contemporary legislative mechanism, but this situation has also carried China's legal tradition in which the statute laws are tended to be made formalistic and symbolic while leaving administrative regulations and rules flexible and pragmatic.<sup>27</sup> The Chinese legislative drafting basically emphasises that primary legislation should be both "general" and "flexible".<sup>28</sup> At the same time, the low professionalism in PRC institutions also requires law drafting not to use very technical terms but to use the everyday language of ordinary people.<sup>29</sup>

As a result, the rationality and authority of primary laws are impaired by such general and vague legal drafting; they are adapted to local conditions with the unrestricted discretion of regional authorities. This practice may meet the needs of regional diversity but it is short-sighted and will undermine the requirements of the stability and predictability of law. Without effective constraint resulting from NPC laws, administrative regulations and rules will frequently be in conflict with national laws operated at the discretion of various agencies at their own advantages. Sometimes, the Party documents are needed to clarify the confusion in implementing ambiguous superior laws.

Before the reforms, governmental officials relied on Party policies and internal decrees to carry out their daily work. This continues to exist, although considerable progress has been made in legalising the Party rule by legal procedures. Party policy is manifested through all kinds of policy statements, administrative regulations, reports of meetings,

---

<sup>25</sup> "Quanguo renmin daibiao dahui changwu weiyuanhui guanyu jiaqiang falü jieshi gongzuo de jueyi" [Resolution concerning strengthening law interpretation work], June 10, 1981, in *huibian*, p. 274-275.

<sup>26</sup> Lubman, 1999, p. 146; Zhang Zhiming, "Zhongguo de falü jieshi" [Law interpretation in China], in Liang Zhiping (ed.) *Falü jieshi wenti* [Issues of legal interpretation] (Beijing: Falü chubanshe, 1998), pp. 173.

<sup>27</sup> Keller, p. 726.

<sup>28</sup> Keller, p. 749.

<sup>29</sup> For a full account of China's legal language, see Claudia Ross & Lester Ross, "Language and Law Sources of Systematic Vagueness and Ambiguous Authority in Chinese Statutory Language", in Karen Turner, et al (eds.), *The Limit of the Rule of Law in China* (Seattle: University of Washington Press, 2000), pp. 221-270.

notices, instructions and speeches of Party officials. The reliance on Party policies instead of formal laws in state administration is a remarkable practice in China, and it will hamper the establishment of a reliable and rational legal system. Since Party policy takes precedence over the law, the latter loses its rationality and internal coherence.

In terms of China's vast territory with various conditions and a long history of factionalism against central authority, to maintain consistency between policy and the law is particularly difficult, especially with the increasingly complicated situation resulting from the reforms. Moreover, the decentralisation of the central power that purports to encourage local economic development and foreign investment has given rise to inconsistency between central and local policies, and even instances of local resistance to and violation of central policies and laws.<sup>30</sup> This disorder in lawmaking and implementation has posed a serious threat to the formation of a coherent and effective administrative legal system.

It is hard to be optimistic about a significant Western impact on China's legal system, because the borrowing of Western legal concepts into the Chinese legislation, especially for laws needed in a market economy, "reflects a formalistic approach, one in which law is regarded as a body of rules that can be 'transplanted' and exist independent of time and place."<sup>31</sup> The transplantation of foreign legal concepts and mechanisms will face obvious difficulties because China's history, culture, traditions, and language differ so greatly from foreign models. Moreover, the potential ideological implications from legal transplanting are also a concern for the CCP regime.

Corne states that China's legal system suffers from normative dislocation in that although traditional Confucian norms were weakened, the new socialist norms were not established. Therefore, when Western legal concepts were borrowed, they were placed side by side with weakened traditional norms, resulting in a normative vacuum in China. In the administrative area, government officials are empowered to draft and implement new laws, and left with broad discretion for them to apply regional norms. As a result, central laws are adapted to local rules and regulations. In this atmosphere of legal dislocation, extra-legal norms such as corruption, favouritism and *guanxi* are poorly sanctioned and able to flourish. Such administrative problems are "at root structural, and stem from a variety of internal weaknesses, ideological constraints, and inadequate legal reforms."<sup>32</sup>

In order to address vagueness and conflicts in the lawmaking system, a comprehensive law concerning legislative work is necessary. Chinese scholars had

---

<sup>30</sup> Lubman, 1999, p. 140.

<sup>31</sup> Lubman, 1999, p. 148.



developed great expectations of a legislative law to solve the problems in the lawmaking process, but they were deeply disappointed when the first PRC Legislative Law was promulgated in 2000.<sup>33</sup>

This law, which seems to have been designed to clarify problems in lawmaking system, failed to achieve the goal of restricting administrative arbitrariness and clarifying the confusing lawmaking system. It widens the scope of laws by categorising administrative regulations and rules as a part of law, thus legalising the lawmaking power of administrative agencies. This law provides rules concerning law interpretation and application which should be exercised by the judicial authority in a society based on the rule of law, and thus goes beyond its jurisdiction. Moreover, it stipulates rules concerning the allocation of legislative powers, which should be regulated by the constitution and has already been specified in the constitution. Such stipulation is actually a revision of, or supplement to, the Constitution, which is not in compliance with the rule of law.

This law further expands the lawmaking powers of the State Council and regional governments in making administrative regulations. In legal interpretation, this law legalises a widespread practice of "whoever makes the law interprets it", a typical feature of the traditional rule of man. In a rule of law society, legal interpretation should be given to courts, aiming to curb lawmakers and to strengthen the stability of law.

The failure of the legislative law in meeting scholars' expectation is partly due to the insistence on the instrumental use of law. In practice, the priority of the Party is to maintain the existing social order, namely, to maintain the legitimacy of the CCP, which make it necessary for the NPC legislature to ensure Party's role in lawmaking process. Whatever Chinese scholars suggest, the CCP does not favour a clear distinction between law and politics. The scholar-drafted version of legislative law is only partly adopted by the legislator. In the end, the law has to be subject to the Party and its policies. A legislative law which satisfies scholars would restrict Party and its government. Besides, administrative agencies

---

<sup>32</sup> Peter Howard Corne, *Foreign Investment in China: the Administrative Legal System* (New York: Trans-national Publishers, 1997). Book review by Robb M. Lakritz ([www.law.emory.edu/EILR/volumes/spg97/LAKAR.html](http://www.law.emory.edu/EILR/volumes/spg97/LAKAR.html))

<sup>33</sup> Bao Wanchao, "Sheli xianfa weiyuanhui he zuigao fayuan weixian shencha ting bingxing de fuhe shencha zhi: wanshan woguo weixian shencha zhidu de ling yi zhong silu" [To establish a combined review system in which a constitution committee is parallel to a constitution-breaching tribunal within the SPC: another thought on perfecting constitutional review system in our country], *Faxue*, no. 4 (1998), pp. 11-15; Qu Xiaoguang, "Lun wo guo de lifa chongtu" [A study of conflicts in lawmaking in our country], *Zhongguo faxue*, no. 5 (1995), pp. 41-47; Li Buyun, "Fa de neirong he xingshi" [Content and form of law], *Falü kexue*, no. 3 (1997), pp. 3-11; Zhang Lian, "Lun fazhi tongyi de shixian tujing yu cuosi" [A study of the ways and measures for realising the unity of legal system], *Falü kexue*, no. 1 (1997), pp. 24-29. Also see Zhou Hanhua, *et. al.*, " 'Lifa fa de hexianxing yanjiu' zuotanhui ." [Symposium of study on whether the legislation law complies with the constitution], *Beida falü zhoukan*, 2: 2 (2000 special issue).



are established actually to carry out Party policy, and governmental officials often experience difficulty in distinguishing laws from policies. Even if officials enforce state laws, they may only apply legal principles rather than articles in order to be flexible in their work.

The rule-making power of administrative agencies is not a legislative power but an administrative power granted by the state. The legislation law categorises administrative regulations as law and thus legalises the practice of partitioning the legislative power. In this matter, this law breaches the principle of constitutionalism. Without political democracy and the rule of law, the current NPC parliament system is still a political show. The use of a term “rule of law” cannot cover up the reality of the rule of man in the lawmaking process, and this legalisation might become a legal veil for the rule of man rather than a constraint. Thus this law does not separate the legislative power but acknowledges the disorder in allocating lawmaking power, turning the process of making Legislative Law into a struggle for pursuing regional and departmental interests without exception from making any other laws.

## **2. Principles and purposes of China’s administrative law**

Modern judicial principles require that in order to constrain administrative discretion it is important to regularise administrative processes and apply judicial review to control administrative arbitrariness.<sup>34</sup> Regulating and restraining governmental power is the essence of establishing a state based on the rule of law. An administrative agency may affect individual rights through its action such as rulemaking, investigation and adjudication, etc. The primary focus of the administrative law is on procedures: how the officials make their decisions rather than what they decide. A procedural justice based on well defined and transparent rules and procedures will give individual and organisations guarantees for a fair treatment. Thus administrative procedures act to constrain administrative discretion within legal scope in order to prevent officials from abuse their power. Thus, it is particularly necessary that exercising of public power must have legal authority. The principle that government must be conducted according to law means that for every act performed by the government there must be legal authority, which is usually derived expressly or by implication from the law.<sup>35</sup> Where the law does not provide all regulations for administrative decision-making processes, there should be legal principles to govern the exercise of discretion.<sup>36</sup>

---

<sup>34</sup> Christopher F. Edley, *Administrative Law: Rethinking Judicial Control of Bureaucracy* (Michigan: Yale University Press, 1990), p. 4.

<sup>35</sup> A W Bradley and K D Ewing, *Constitutional and Administrative Law* (London: Longman, 1997), p. 705.

<sup>36</sup> *Ibid*, P. 707.

In the West, the courts have two major ways to check administrative power, including judicial review and state compensation. According to modern administrative legal theory, a constitution has supreme authority in restraining legislation and governmental actions. In doing so, judicial review is used to check any governmental actions that breach the constitution or are in conflict with the constitution. Judicial review is acting both as a remedy to the affected parties and as a constraint to administrative power.

A prestigious judge in England, Lord Diplock, stated the grounds of judicial review using three broad classes: legality, rationality and procedural regularity.<sup>37</sup> The first principle in judicial review of administrative power is legality, which refers to the legal authority of an administrative action. If this action has no legal grant, then it is illegal and should be held accountable; the second principle, rationality or reasonableness, sets general requirements for the exercise of discretion. It demands that whenever discretion is being exercised, the motivation, the purpose, the reasoning and the decision of the discretion should be "reasonable" without abuse of the power. As for how to decide whether an administrative action is reasonable or not, Lord Greene articulated a principle, which is known as "Wednesbury unreasonableness", referring to "a decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."<sup>38</sup>

The third principle, procedural propriety, asks that administrative agencies must abide by certain procedures when some actions must be followed according to law. If the administrative agencies fail to comply with such a requirement, it may be decided that they have acted outside their powers and thus should be dealt with by the courts. This principle requires that administrative procedures should be fair and open, and that a person should not be denied the chance to represent himself or to a fair hearing.<sup>39</sup>

Chinese scholars in administrative law have not reached an agreement relating to what principles China's administrative law should adopt.<sup>40</sup> As for judicial review, they

---

<sup>37</sup> Generally see William Wade and Christopher Forsyth, *Administrative Law* (Oxford: Clarendon, 1994, 7<sup>th</sup> ed.); also see Lord Diplock's comment in *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374, quoted in Brian Thompson, *Textbook on Constitutional and Administrative Law* (London: Blackstone Press, 1993), P. 377.

<sup>38</sup> Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223, quoted in Brian Thompson, p. 378.

<sup>39</sup> Lord Denning gave birth to the idea of legitimate expectation for a hearing, which indicated that a hearing might be required because a decision might remove a licence. The doctrine has also been used to require a hearing where there was a legitimate expectation that a hearing would be given. See Brian Thompson, p. 397.

<sup>40</sup> Yang Zhongwen and Liu Chunping, "Kong quan, pingheng: lun xingzhengfa de benzhi" [Power control and power balance: on the essence of administrative law], *Qiu shi xuekan*, no. 2 (1997), p. 55; Xu Chongde and Pi Dechun, *Xin Zhongguo xingzheng faxue yanjiu shuping* [A review of studies on new China's administrative jurisprudence] (Beijing: Falü chubanshe, 1991), pp. 98-99.

generally agree that both legality and reasonability must be applied to judicial review and the legality should include both substantial and procedural legality. But their opinion about the nature and purpose of the administrative law is controversial. Generally there are three different views of the function of administrative law: state administration, power-control, and balance (of power and rights).<sup>41</sup>

The first theory is about the traditional role of administrative law in the planned economy, where the state acted as an omnipotent governor and manipulated all social areas. This management style regards administrative law as a law of state administration based on the relationship between rights and responsibility, and between order and obedience.<sup>42</sup> This view stresses responsibility the administered subjects should bear where they fail to abide by the state law, but does not stipulate the state's legal responsibility in the process of administration.<sup>43</sup> Where an administrative misconduct happens, it is handled within the administrative hierarchy rather than the courts. In contemporary China, it remains popular that the nature of administrative law is normative stipulations on state administration, or a law regulating administrative activities and relations. This theory, since it excessively emphasises state administration while ignoring subjects' interests, cannot create a supervision mechanism over the state and its officials.

Since 1990, the theory of power-control arose.<sup>44</sup> As a popular theory in common law systems, power-control stresses protection of rights through requiring the administrative power being exercised according to strict legal procedures. It considers the increasing expansion of the administrative power in modern times to be a major concern, and thus it is necessary to curb such power through administrative law in order to prevent political corruption and safeguard citizens' rights. The main effective means for this purpose is clear legal procedures to regulate governmental decision-makings and judicial review to check the legality of their actions. Scholars in favour of this theory advocate that China's administrative law must contain the principle that it is administrators rather than subjects who undertake responsibilities. This requires that administrative agencies act in accordance with law and focus on power control and rights protection. At the same time, the judicial

---

<sup>41</sup> Chen Sixi and Liu Nanping, "Zhongguo xiandai xingzhengfa fazhan dui xianfa de yingxiang" [Impacts of the development of administrative law in modern China on the constitution], *Xingzheng faxue yanjiu*, no. 1 (1998), p. 32.

<sup>42</sup> Luo Haocai, "Xingzhengfa zi yuyi yu yiyi fenxi" [An analysis of discourse and meaning of the administrative law], *Fazhi yu shehui fazhan*, no. 4 (1995), p. 11.

<sup>43</sup> This theory is stressed during 1979-86, see Gao deng xuexiao faxue shiyong jiaocai, *Xingzhengfa gaiyao* [An outline of administrative law] (Beijing: Falü chubanshe, 1983), p. 1.

<sup>44</sup> Zhang Shangzuo (ed.), *Zou chu digu de Zhongguo xingzheng faxue* [China's administrative jurisprudence after its stepping out from the low land] (Beijing: Zhongguo zhengfa daxue chubanshe, 1991), p. 695.

review should play an important role in holding state agencies and their officials accountable for their abuses of power.<sup>45</sup>

These scholars emphasise three features of Western administrative law: clear distinction of public and private laws, the government's exercising administrative power according to law and the control over public power. They claim that administrative law aims to govern and restrict administrative power rather than give the power to administrative agencies to make rules themselves.<sup>46</sup> However, this theory is rejected in China as politically incorrect in that its theoretical foundation is the separation of powers. This hostility towards power-control is related to the long-standing centralisation of the economic and political system. To control government power is considered to weaken its administration. The understanding of *yi fa xingzheng* by administrative agencies is to rule according to law without binding their hands by the law. Thus problems occur where the modern market economy appeals for protecting individual rights and restricting governmental power, while China's tradition and current political structure resist the appeal.

The theory of balance is advocated by Luo Haocai and his postgraduate students, who claim that the above theories are incomplete and limited. They believe that the power-control theory puts too much on restriction of power and the role of judicial review, while ignoring the requirements for the state's proactive administration in modern societies aiming to improve administrative efficiency and protect public interests. Luo argues that a balance theory fits well in with the purpose of the administrative law. By keeping a balance between the administrators and their subjects, it is devoid of shortcomings existing in two other theories. He claims that the purpose of the administrative law is to seek an inner balance in state administration through harmoniously treating right and responsibility.<sup>47</sup> He claims, in modern societies, conflicts between public and private interests widely exist, which requires

---

<sup>45</sup> Gao Bing, "Kong quan lun: xiandai xingzheng faxue de lilun jichu" [Theory of power control: theoretical foundations of modern administrative jurisprudence], *Nanjing shifan daxue xuebao*, no. 4 (1998), pp. 20-23; Cheng Ganyuan and Li Zaihua, "Shichang jingji he xingzheng faxue 'kong quan lilun' de sikao" [Thinking of the market economy and the theory of power control in administrative jurisprudence], *Xue hai* (Nanjing), no. 5 (1994), pp. 62-66.

<sup>46</sup> Ibid.

<sup>47</sup> Luo Haocai & Yuan Hongshu, "Xiandai xingzhengfa de lilun jichu: lun xingzheng jiguan yu xiangdui yifang de quanli yiwu pingheng" [Theoretical foundation of modern administrative law: on the balance of rights and responsibility between administrative agencies and their subjects], *Zhongguo faxue*, no. 1 (1993), p. 54. Articles in this area have a long list. For example, Shen Gui, "Shi xi xiandai xingzhengfa de jingyi: pingheng" [A tentative study of the essence of modern administrative law: balance], *Xingzheng faxue yanjiu*, no. 3 (1994), pp. 12-15; Wang Xizi, "Zai lun xiandai xingzhengfa de pingheng jingshen" [A second study of spirit of balance in modern administrative law], *Fa shang yanjiu*, no. 2 (1995), pp. 37-41; Luo Haocai & Shen Gui, "Pingheng lun: dui xiandai xingzhengfa de yi zhong benzhi sikao: zai tan xiandai xingzhengfa de lilun jichu" [Theory of balance: a essential thought on modern administrative law--A second discussion of theoretical foundation of modern administrative law], *Zhongguo faxue*, no. 4 (1996), pp. 1-7.



correctly handling through building a balanced administrative law system. It is important for administrators to protect citizens' rights and interests by open and transparent administration, effective surveillance and legal remedy, and at the same time, state agencies must be entrusted effective power and supportive means to carry out comprehensive administrations in order to protect the public interests.

However, the theory of balance has also come under criticism. Critics argue that constraining administrative power and protecting private interests should not be treated as issues of equal importance, and more emphasis should be put on the former in order to achieve the latter.<sup>48</sup> When the term *yi fa xingzheng* was set for the goal of administrative reform, there was a general agreement among scholars about basic requirements for *yi fa xingzheng*: (1) the government should act according to law; (2) all administrative powers must have legal foundation and must not perform powers without clear stipulation; (3) administrative powers performed without or beyond legal authority are illegal and void; (4) subjects under administrative powers have the right to apply for a reconsideration of illegally performed administrative powers, or to file an administrative lawsuit to the courts for remedy, and (5) the victim of administrative power abuse is entitled to state compensation according to law.<sup>49</sup>

In China's legal system, administrative law has not been well developed either theoretically or practically, and was thus referred to in the early 1980s as "a forgotten corner".<sup>50</sup> From 1979 to the end of 1987, the NPC and its SC enacted 63 administrative laws (not including decisions), and the State Council issued more than 580 regulations, local governments issued over 960 administrative regulations.<sup>51</sup> However, these laws and regulations mainly concerned institutional organisation. The administrative legal system was not known as a specific subject. At that time, most people (administrative personnel) only knew the existence of criminal, civil and economic law, but had no idea of administrative law; they knew how to handle cases according to laws only in [the] judicial sector, but not in administrative area. Up to the middle of the 1980s, China still lacked basic laws aiming to regulate administrative behaviour, administrative liability, remedy, and in most

---

<sup>48</sup> Yang Jiejun, "Guanyu xingzhengfa lilun jichu ruogan guandian de pingxi" [A review of several opinions on theoretical foundation of administrative law], *Zhongguo faxue*, no. 2 (1996), pp. 64-75; Cheng Xi, " 'Pingheng lun' de kunjing " [The dilemma of the theory of balance], *Xingzheng faxue yanjiu*, no. 4 (1996), p. 37.

<sup>49</sup> Gong Pixiang, *Dangdai zhongguo de falü geming*, 1999, p. 340.

<sup>50</sup> Wang Xixin, "Administrative Law in China's Changing Society," *British Law Week: The China Connections: Legal Forum* ([http://www.enstar.co.uk/china/law/blw/art\\_administrative.htm](http://www.enstar.co.uk/china/law/blw/art_administrative.htm)).

<sup>51</sup> Zhang Qingfu (ed.), *Fazhi jianshe shi nian* [Ten years of legal construction] (Lüyou jiaoyu chubanshe, 1988), p. 94.

administrative areas, there were no laws to govern at all. Administrative agencies and their personnel mainly followed policy documents in the work.<sup>52</sup>

However, since 1989, the Administrative Litigation Law (ALL) was enacted and for the first time in the history systematically provided individuals, legal persons, and even foreigners the entitlement to sue the state,<sup>53</sup> and introduced a system of judicial review over administrative actions, fundamental changes have been made in the administrative law system. The courts exercise a function of judicial review, force officials to abide by the law and give legal remedy to the afflicted. This empowers people where and how they may legally battle arbitrary or unfair bureaucratic acts. They also send a message to governmental officials and agencies: in your decision-making, do not act like a tyrant, and your verdict is neither irreversible nor final.

Since then, a frame of administrative law has been in emergence, including administrative organic and personnel laws and regulations, where the most important one is the regulation concerning civil servants; monitoring and supervision mechanisms over governmental agencies and their officials from both external and internal surveillance, where the most important ones are Legislative Law and the Administrative Supervision Law (*xingzheng jiancha fa*); a relatively complete administrative litigation system, represented by the ALL and the State Compensation Law (SCL); and an increasingly emphasis of procedural justice in power control marked by the Administrative Penalty Law (APL) and the Administrative Redress Law (ARL). At current, a systematic procedural law is in drafting process.

Under China's legal system, the principles for checking administrative discretion are much narrower than that in the West. According to the ALL, only a concrete administrative action (*juti xingzheng xingwei*, 具体行政行为, which refers to an actual action exercised by an agency such as imposing fines, confiscating properties, detaining people and rescind licenses) that has infringed people's rights may be sued to the courts. It does not include a situation where a state agency acts illegally but not infringe the rights of the affected party, or it acts legally but infringes rights. It is unclear whether both infringement and illegality needed for the courts to accept a case. Thus the ALL, as the major means of judicial review, aims only to examine the legality of an administrative action. However, for a citizen or company, he/she can sue an agency only when an administrative action is both illegal and infringes his/her rights.

---

<sup>52</sup> Jiang Ming'an, "Cong renzhi zouxiang fazhi: Zhongguo xingzheng fa shi nian huigu" [From the rule of man to the rule of law: a retrospect of ten years of China's administrative law], *Qishu xuekan*, no. 6 (1997), p. 59.

Moreover, the ALL is not empowered to check the reasonability or impropriety of abstract administrative actions (*chouxian xingzheng xingwei*, 抽象行政行为, which refers to administrative regulations and rules). In other words, the activity of administrative organs to make administrative regulations, decisions and orders will not be reviewed. When an illegal administrative action is traced down to a relevant regulation, the courts have no authority to repeal or correct it but often report the case to the government for instruction or simply reject the case. This narrow scope of the ALL conflicts with the stipulation in the administrative redress law, in which both legality and reasonability of an administrative action may be reviewed by the redress body (it still does not cover regulations promulgated in the name of the State Council or a provincial governor). The intention of this difference is likely to leave a chance for the government itself to correct its mistakes, but in practice when a party appeals to the courts to review a decision made by the administrative redress body, the courts cannot accept it because they are not authorised to review its reasonability.

### **3. Control of administrative power in China**

In China, means for control over administrative actions include legislative control mainly through the constitution and the legislative law; administrative control through administrative laws and regulations carried out within administrative hierarchy; and judicial control under the administrative litigation law and the state compensation law. Although supervision by the media and public has a role to play under the constitution, it is never feasible under the current political framework.

First, legislative control of administrative power mainly works through establishing a constitutional state with power allocation and separation. One of the usual objectives of a constitution is to set limits or restrains upon governmental power, which derives from the theory of constitutionalism.<sup>54</sup> The supremacy of the constitution is the essence of realising the rule of law with emphasis on "an institutionalised system of effectively regularised restraints upon governmental action".<sup>55</sup> There may be four ways of restraining governmental actions in a constitution: the formulation of principles of justice and declarations of rights; the division of powers amongst governmental bodies according to functions and territory; the adoption of representative institutions which allow the people to vote governments into and out of office; and provision for direct participation by the people in governmental decision-making.<sup>56</sup>

---

<sup>53</sup> In the General Principles of Civil Law enacted in 1981, there was a brief stipulation of allowing citizens to bring about an administrative suit.

<sup>54</sup> Thompson, p. 59.

<sup>55</sup> Friedrich, C.J., *Man and His Government* (New York: McGraw-Hill, 1963), p. 217.

<sup>56</sup> Alder J., *Constitutional and Administrative Law* (Basingstoke: Macmillan, 1989), pp. 39-40.

Chinese legal scholars acknowledge that the rule of law is actually rule of the Constitution. They state that the constitution is the key for realising the rule of law because it is an agreement made by the whole society, particularly between the people and the government. People and the government all must obey it, but first of all, the government must obey it, so that people will follow it. If only people are required to obey the law, there will be a government based on the rule of man. These scholars realise the difference between *Yi fa xingzheng* and *xingzheng fazhi* in that the latter stresses equality between the administrators and their subjects, and power co-operation and control. Thus the current China is far from being a country based on administrative rule of law.<sup>57</sup>

According to Guo Luoji, the aim of existence of the constitution is to realise the rule of law, so it is unnecessary to add an article "administering the state according to the law, to establish a socialist country based on the rule of law" in the Constitution. Because such revision seems to admit that in the past China didn't adopt the rule of law although the Constitution existed, and that adopting the rule of law is just to let the whole constitution rather than a single article play its role. He claims that this only shows that Chinese leadership does not understand what the constitution acts for.<sup>58</sup>

Although China has its constitution, it is no more than a political declaration or charter in that it has no authority to review administrative actions and itself cannot be enforced through judicial process. Since the founding of the PRC, China has made several constitutions and many revisions. However, the constitution is difficult to become supreme since it also legalises the supremacy of the Party leadership in state administration. Although the senior politicians call on Party acting within the constitution and laws, the law is in fact a veil for transforming Party policies into laws through administrative agencies.<sup>59</sup> In this situation, the constitution and law are only second authority compared to Party leadership. Thus Party leadership, as the core in Chinese administration, is not subjected to any judicial review. In practice, Party policies and guidelines are main sources of administrative powers. The constitution can do nothing to restrict the Party and its government. Administrative rule of law requires that the Party must not replace the government and that a clear line must be drawn regarding the relationship between Party's policy and laws, and between the Party and

---

<sup>57</sup> Guo Daohui, "Fazhi xingzheng yu xingzheng quan de fazhan" [Administrative rule of law and the development of the administrative power], *Xiandai faxue*, no. 1 (1999), pp. 13. Also see Ying Songnian, "Yi fa xingzheng lun gang" [A study outline of exercising administrative power in accordance with law], *Zhongguo faxue*, no. 1 (1997), pp. 29-36.

<sup>58</sup> Guo Luoji, "Fazhi: xianfa zhishang" [The rule of law is the supremacy of the constitution], *Zhengmin* (Hong Kong), no. 292 (2002), pp. 71-74.

<sup>59</sup> Wang Hanbing, "Peng Zhen Tongzhi dui wo guo shehuizhuyi minzhu fazhi jianshe de zhuyue gongxian" [Remarkable contributions Comrade Wang Hanbing and Peng Zheng to our country's socialist democratic and legal construction], *Guangmin ribao*, 26 October 1997, p. 4.



the state. As long as one Party is supreme, neither the constitution nor the rule of law will work out well.

Since the constitution itself does not have supreme authority, neither the NPC nor its Standing Committee has the power of control over administrative agencies. According to the constitution, the NPC exercises legislative supervision over the administrative power through checking sub-regulations and watching their implementation in order to maintain conformity between administrative actions and the constitution and national laws. There was not a legislative law until 2000 in China to specify lawmaking power and procedures. However, this law has limits set for itself in constraining administrative arbitrariness. In China's political system, the NPC does not possess sufficient institutional autonomy to impose its authority over the government, and its legislative power has also been overshadowed by ever-expanding lawmaking power of the government. The NPC only provides an additional forum in which "powerful interests can seek to influence the transformation of policy into legislation in the cumbersome course of decision-making."<sup>60</sup> Such is also the case with local or regional people's congresses.

Control over governmental actions can also be achieved through administrative supervision conducted within administrative hierarchy. Chinese scholars divide China's efforts to constrain administrative power into two stages.<sup>61</sup> The first stage started in the middle of the 1980s with the emphasis on restriction over governmental power by substantive laws, but the substantive laws are always hard put to meet the need in reality for curbing increasingly-expanded administrative power in a time of reform. This resulted in consistent abuses of official power, and furthermore, *yi fa xingzheng* turned out to be administering according to self-made administrative regulations and rules. Since the ALL did not exist at that time, there was no judicial check over governmental power, and even if this law came into effect in 1990, the courts only had the power to check the legality of an administrative act rather than that of a regulation or rule. The second stage of China's administrative supervision revolved around procedural constraint with the focus on the enactment of the administrative penalty law and redress law. A comprehensive administrative procedural law is at present under heated debate and discussion among legal and official scholars.<sup>62</sup>

---

<sup>60</sup> Keller, p. 740.

<sup>61</sup> Feng Jun, "Lüelun wo guo xingzheng chengxu zhidu zhihou de yuanying, fazhan tiaojian yu qianjing" [A brief discussion of reasons behind the backward of the administrative procedural system, conditions for its development and the prospect], *Faxuejia*, no. 2 (1998), p. 58.

<sup>62</sup> Ying Songnian, "Wo guo xingzheng chengxu falü zhidu zhi xianzhuang" [The current situation of administrative procedural system in our country], *Jiancha ribao*, 27 September 2002, 5 October 2002 (<http://www.jcrb.com.cn/id=8168>); Yang Jingyu, "Guanyu 'Zhonghua renmin gongheguo xingzheng

From rebuilding public authority to afterward granting a remedy to private right and then to direct control over the public power, China's administrative law has made gradual improvements. Like other administrative legal systems, China's administrative law aims to safeguard and supervise administrative agencies in exercising their functions and powers, to prevent and rectify any malfeasant or improper concrete administrative acts, and to protect the lawful rights and interests of citizens, legal persons, and other organisations. Before the ARL (*xingzheng fuyi fa*, administrative redress law, 行政复议法, 1999), APL (*xingzheng chufa fa*, administrative penalties law, 行政处罚法, 1996) and the ASL (*xingzheng jiancha fa*, administrative supervision law, 行政监察法) were enacted, it was the Regulation of Administrative Reconsideration (or Redress, ARR) enacted by the State Council in January 1991 and amended in 1994, that served as a way to examine both the legality and reasonableness of administrative actions within the administrative hierarchy. According to this regulation, individuals or legal persons whose rights or duties are affected by governmental actions may appeal to authorised agencies for remedy. Reviewing agencies, after examining cases, shall make decisions affirming, repealing or directly changing the original decisions. These decisions shall be judicially subject to review unless law otherwise prescribes them. In practice, about 70% of administrative cases have been through the stage of reconsideration before their submission to the courts.<sup>63</sup>

Where an administrative action was wrong or illegal, afflicted parties may choose the following judicial or administrative means to get remedy. Within administrative measures, five categories of administrative actions may be challenged. The first one is administrative sanction, including detention, fine, rescission of a permit or a licence, order to suspend production or business operations, or confiscation of property, which a citizen, legal person or other organisations refuse to accept. The second is compulsory administrative measures, including restriction of personal freedom or the sealing up, or freezing of property which one refuses to accept. The third category is infringement on autonomous management of enterprises. The fourth is refusal to issue a permit or licence or a failure to respond to an application. The fifth is refusal to perform its statutory duties with regard to protecting one's personal or proprietary rights.

---

xuke fa caoan de shuoming' " [Explanatory remarks on the draft of the PRC administrative approval law], *Renmin ribao*, 26 August 2002; Wu Dexing, "Lun zhongguo xingzheng fazhi de chengxuhua yu xingzheng chengxu de fazhihua" [On the proceduralisation of China's administrative legal system and the legalisation of its administrative procedures], *Zhongguo renmin daxue xuebao*, no. 1 (1997), pp. 83-88; Yang Haikun, "Zhongguo xingzheng chengxu fadianhua suo mianlin de kunnan ji women de shexiang" [Difficulties facing codification of China's administrative procedures and our suggestions], *Nanjing shehui kexue*, no. 9 (1998), pp. 53-60.

There are four kinds of administrative acts which are not subject to reconsideration, including abstract actions such as policies, regulations, rules and instructions; internal actions within administrative system; actions of state; arbitration and conciliation; and other dispositions of civil disputes. When an administrative regulation or order, which binds the administrative action, is illegal or unreasonable, the reconsideration organ will not have the power to handle the matter. It has to report the case to a higher-level administrative agency, which has the authority to handle the case, to resolve the inconsistency between the regulation and concrete administrative action. Then the reconsideration organ may resume the hearing of the case.

The 1999 ARL made some development in that it allows governmental regulations to be challenged all the way to the State Council. It permits foreign citizens, Chinese nationals and social organisations to appeal administrative rulings and allow them to "seek shelter from abuse of state power".<sup>64</sup> Appeals can be taken to the village head, county government, prefecture government, provincial government, and finally to the State Council which would render a final decision. On the other hand, however, the rules or orders by provincial governments or the State Council are nonetheless immune from this law. Despite such limitations, by exercising inherent executive control, the ARL will provide another set of institutional safeguards against administrative abuses. However, problems remain serious, such as overloaded cases and low efficiency in accepting cases; narrow scope of redress; the conflict with the APL; the difficulty in bringing about the applications, due to the relevant agencies that often failed to notice or give wrong information to the affected parties about their appeal right; the chaos and limits of jurisdictions; inadequate personnel and independent institutions; and lack of procedures.<sup>65</sup>

The promulgation of the Administrative Penalties Law (APL) in 1996 is an advance in that it generally prescribes the jurisdictions of administrative sanction-deciding process, the varieties of administrative sanctions, the procedures for imposing sanctions on individuals, and the remedies for any wrongly imposed penalties. This law for the first time introduces two fundamental principles of modern administrative procedure. One is the informing responsibility in which the administrative agencies must inform the subjects of facts, causes and foundations of action before an administrative action is made. The other is the involved party has the right to make a statement and defence. It also firstly introduces the hearing system in which the concerned party may exercise his informed right and defence

---

<sup>63</sup> Legislative Affairs Bureau of the State Council, *Xingzheng fuyi tiaoli de jieshi* (The interpretation of the regulation on administrative reconsideration) (Beijing: Zhongguo fazhi chubanshe, 1990), p. 2.

<sup>64</sup> *China Daily*, 30 April 1999.

through this quasi-judicial procedure, thus making China's administrative sanction procedure being closer to the international standard, from a closed and purely administrative process to an open and party-participating one.

However, the APL fails to specify the contents of these principles and systems, leaving stipulations concerning protection of human rights vague and narrow. For example, a hearing mechanism does not apply to some severe administrative penalties such as measures of restricting personal freedom although some such penalties are far more severe than criminal penalties. It is also confused with respect to who has the power to exert specific administrative penalties; what difference between penalties and non-penalties involving closed-door transactions and corruption; what requirements for a summary procedure, leaving out many necessary procedures such as keeping a written record, party's signatures, and using written notification, and how to guarantee a fair and open hearing, unspecified; narrow scope for applying a hearing (limited in price-deciding area) and lack of effective mechanism to monitor this process except self-surveillance within administrative authority. In addition, there are many conflicts between this law and other administrative regulations.

The ASL provides another means for curbing administrative power through establishment of special supervision institutions (*jiancha bu* at central level and *jiancha ju* at local level, which originated from an imperial tradition of keeping the officialdom under surveillance). It is similar to the role played by the Discipline and Investigation Commission at all levels on Party-officials. However, all kinds of administrative supervision are self-conducted surveillance, which gives rise to a question as to who supervises the supervisors? The effectiveness and accountability of this supervision is obviously problematic.

The problem with the administrative monitoring system is its lack of transparency, narrow scope, vagueness, and mutual conflicts, which has resulted in widespread favouritism and power abuses in practice. To solve this problem, a comprehensive procedural law governing the administrative work must be made, with more emphasis on requiring state authorities than their subjects to abide by legal procedures. The purpose of this law is to realise administrative rule of law by urging officials to abide by legal rules, maintaining efficiency and protecting citizens' rights.

Currently, China's administrative procedures, except for that in lawmaking, imposing penalties and reconsideration, remain scattered among other substantive regulations. Usually a decision is made first and procedures followed later but these procedures are often generally stipulated with great discretion to officials in the

---

<sup>65</sup> Wang Wenshu, "Xingzheng fuyi nan zai hechu?" [Where do problems occur in administrative redress], *Xingzheng yu fa*, no. 4 (1998), pp. 21-22.



implementation. Even the newly introduced hearing mechanism only covers three areas: where imposing a severe sanction, price-making policy, and drafting administrative regulations and rules, and the procedures required remain unclear.<sup>66</sup> Moreover, many regulations set procedures for the affected rather than for administrative agencies. This underdevelopment of the administrative procedures is laid far behind the request for forming a market legal system and administration according to law.

The third means of curbing administrative power is judicial review. Judicial review is widely used to restrict state power in modern democratic countries, which is based on the traditional suspicion of arbitrary power and the belief in the separation of powers and the independence of the judiciary.<sup>67</sup> The ALL brings the judicial review to China's administrative law system. According to it, individuals and legal persons who are affected by administrative actions directly or indirectly may bring cases against such actions to the people's courts. The courts, exercising virtually the power of judicial review, shall make a judgement that either confirms the committed action or repeals it in accordance with law, or even changes it in case "the decision being sued is obviously unfair".<sup>68</sup>

From 1993 to 1999, after the ALL was enforced, the courts handled 281,947 cases of administrative litigation at the first instance, with an annual increase on average of 26.7%.<sup>69</sup> By the end of 2001, the courts had nearly handled 440,000 administrative cases and 2,566 state compensation cases.<sup>70</sup> In recent years there have been an increasing number of cases of citizens charging the government. This shows that individuals and companies are more aware of their legal rights and more prone to protect their legitimate rights and interests through legal means. At the same time, state officials are becoming more cautious about their actions and decisions. Xiao Yang, President of the SPC, admitted that the ALL was a key element in determining the progress of democracy and the rule of law, and that it was a parameter of the level of the rule of law, rights protection, quality of administration and legal awareness. He asked to meet the challenge of and benefit from entering the WTO in order to

---

<sup>66</sup> Ying Songnian (President of the State Administrative College), lecture at the 23rd legal lecture to the Standing Committee of the NPC, *Renmin ribao*, 17 December 2001.

<sup>67</sup> C.T.Emery and B. Smythe, *Judicial Review: Legal Limits of Official Power* (London: Sweet and Maxwell, 1986), Introduction, pp. 16-17. The writers of this book also mention an increasing suspicion in modern democratic societies about the effect of judicial review since the judicial power is also becoming too independent and arbitrary.

<sup>68</sup> Article 54 of the ALL, see the Legal Bureau of the State Council (ed.), *Zhonghua renmin gongheguo xin fagui huibian* [The collection of new laws and regulations of the People's Republic of China], vol. 2, (Beijing: Xinhua chubanshe, 1989), p. 14. For detailed analysis of the provisions of the ALL, see Pitman Potter, "The Administrative Litigation Law of the PRC: Judicial Review and Bureaucratic Reform," in Potter (ed.), *Domestic Law Reforms in Post-Mao China*, pp. 270-304; Susan Finder, "Like Throwing an Egg against A Stone? Administrative Litigation in the PRC," *Journal of Chinese Law*, vol. 3, no. 1 (Summer 1989), pp. 11-27.

<sup>69</sup> Gong, Pixiang, *Dangdai Zhongguo de falü geming*, p. 355.

expand the scope of the judicial review.<sup>71</sup> The entry into the WTO caused at least three challenges to China's judicial review, including transparency in administrative process, expansion in judicial review's scope, and unification of administrative procedures.<sup>72</sup>

However, the judicial review is limited and sometimes fails to curb administrative powers and protect rights and interests. Reasons behind this include lack of judicial independence in China's power structure, the domination of the political and administrative powers and the shortcomings in laws concerning judicial review.<sup>73</sup> The PRC courts are restricted from interpreting laws and regulations since this power is exercised by lawmakers themselves, and are not permitted to repeal any laws or regulations even if there existence of conflicts or breaching good faith.

Since the principle for judicial review is to check legality rather than include reasonableness of an administrative action, the courts cannot check and repeal the regulations or rules on which an administrative action is based. This often caused delays in some simple administrative cases and failures in protecting rights. For example, a three-year-old boy was dead with unclear reason at a kindergarten in Shandong in 1998, and the local PSB ordered the cremation of the child's body. The parents of the child sued the PSB for this action according to a document (no. 47) issued in 1978 by the then Provincial Revolutionary Commission, which was already out of date. When the defendant's lawyer asked the plaintiff's lawyer in the court that "You said that the no. 47 document was out of effect, please give your evidence"; the latter could not present any such proof and the court finally

---

<sup>70</sup> *Zhonghua renmin gongheguo falü nianjian*, 2002, p. 49.

<sup>71</sup> Xiao Yang, "Quanguo fayuan xingzheng shenpan gongzuo huiyi shang de jianghua" [speech at the conference of nation-wide courts on administrative adjudication], *Zhongguo lishi*, 3 December 1999, 24 July 2001 (<http://www.chineseslawyer.com.cn>).

<sup>72</sup> *Beijing Qingnian bao*, 29 Januray 2002, p. 24.

<sup>73</sup> Jiang Dehai, "Chouxiang xingzheng xingwei yin naru xingzheng susong" [Abstract administrative actions should be included into administrative litigation], *Jiancha ribao* in *Zhengyi wang*, 26 August 2001, 5 December 2001 (<http://211.100.18.62/fzdt/xwar.asp?id=7980>); Ma Huide, "Chongxin shenshi xingzheng shou an fanwei de falü guiding" [Re-reviewing legal stipulations on scope of administrative litigation], *Renmin fayuan bao*, 15 April 2002, 8 July 2002 (*Zhengyi wang* <http://211.100.18.62/fzdt/xwar.asp?id=6319>); Tang Zuoping, "Gongan xingzheng xingwei yu zhencha xingwei de quding" [On differentiation of police actions from public administration and investigation], *Renmin fayuan bao*, 2 July 2001, p. 9; He Haibo, "Xingzheng susong shou an fanwei: yi ye sifaquan de shixian shi (1990-2000)" [The scope of the administrative litigation: a page of history of realising judicial power], *Xingzhengfa luntan*, 13 October 2001, 12 November 2001 (<http://www.1488.com.cn/bbs/showannounce.asp?id>); Ma Huide and Ge Bowei, "Shijie maoyi zuzhi yu Zhongguo xingzheng susong zhidu de fazhan" [The WTO and the development of China's administrative litigation system], *Zhengfa luntan*, no. 2 (2002), pp. 12-15; Yang Jiejun, "Tizhi--yuanze--fanwei: Shijie Maoyi Zuzhi yu xingzheng susong zhidu biange" [The system, principle and scope: WTO and reform of the administrative litigation], *Faxue*, no. 4 (2002), p. 3; Li Shaohua, "Lun dui chouxiang xingzheng xingwei de sifa shencha" [A study on review of the abstract administrative actions], *Henan shen zhengfa guanli ganbu xueyuan xuebao*, no. 2 (2000), pp. 72-75; Jiang Ming'an, *Zhongguo xingzheng fazhi fazhan jingcheng diaocha baogao* [Findings on the development of China's administrative rule of law] (Beijing: Falü chubanshe, 1998), p. 190.

had to adjourn the trial since it had not power to rule against an administrative regulation under China's legal system.<sup>74</sup>

Due to narrow scope for judicial review, some state agencies or the organisations that exercise power of public administration are beyond litigation, and many administrative actions are not to be checked by the courts. A case in point is the function of PRC police. They are entrusted with a wide range of power in both maintaining social order and criminal investigations, which frequently cause infringement on rights of citizens, legal persons, and other organisations. According to law, police investigations of criminal activities is governed by criminal procedural law, which belongs to a judicial action rather than an administrative one, and is thus exempted from judicial review; while police administration of social order is governed by the administrative regulations, which is an administrative action rather than a judicial one and is thus subject to judicial review.<sup>75</sup> Where any infringement of personal or property rights happened during a criminal investigation, instead the administrative remedy, the affected parties should be compensated through judicial process according to the SCL (which is not tried by the court but ruled by an internal compensation commission established within the courts at above intermediate level), in order to ensure criminal investigation and adjudication to be successfully carried out.

It is difficult to distinguish the two police actions, since the PSB are very powerful in a police state with great discretion on whether or not to bring a prosecution. In practice, the two functions are often interwoven with the same category of subjects and involvement of compulsory measures, and thus often result in many abuses. When the police, after adopting compulsory measures such as detention, confiscation and interrogation, fail to enter judicial process by bringing a charge, they usually deliberately suspend the case, thus making it neither an administrative action nor a criminal one. The affected party in such a case cannot bring administrative litigation against the police, and some of such parties become victims of long detention in the police station. This situation further encourages the police in infringing human rights without the risk of bearing legal responsibilities. In recent years, it is very popular that the police, in the veil of conducting judicial actions, trample on personal freedom and property rights by interfering in economic disputes.

In order to protect rights of the administered subjects and to prevent the police from shunning any legal responsibilities for their abuse of power, the courts should check both police actions according to the ALL. After a case is accepted, it should be the police that

---

<sup>74</sup> *Nanfang zhoubu*, 18 December 1998, p. 13 and 12 March 1999, pp. 6-7.

<sup>75</sup> Ma Huide, "Gong'an zhencha xingwei xingzheng ke shu xing yanjiu" [A study of administrative litigationability of police investigation], *Xingzhengfa luntan*, 25 October 2002, 6 December 2002 (<http://www.1488.com.cn/bbs/showannounce.asp?id>).



prove what kind of functions they are carrying out. Although the criminal law as such falls outside the ALL, management of the police and the penal system often gives rise to disputes about the exercise of official powers, for example, over the rights of convicted prisoners to legal protection against the prison authority.<sup>76</sup> In China, the police exercise extraordinarily powerful functions in management of the society, from which numerous illegal actions emerge.

Loopholes and conflicts are not uncommon in the ALL and its relevant interpretations. The preface (article 1) states that the purpose of this law is to safeguard and supervise administrative agencies' exercising power according to law, which is improper in that its primary purpose and function should be to restrict administrative arbitrariness and protect citizens' rights rather than protect administrative functions. Article 2 provides that only administrative agencies may be accused as a defendant in the ALL, their personnel, since they are performing their duties on behalf of the government, and many other agencies and organisations which in practice exercise the same functions as administrative agencies (such as schools, universities, public companies) are beyond the scope of the jurisdiction of the ALL. In addition, the Party's administrative actions are not subject to such review since it does not belong to any state agencies. Cases involving governmental inaction (unless a request is being made) and public welfare (such as road safety, environment pollution, etc) are also not within the judicial review.

Many other problems in the ALL hamper its effect and meanwhile permit state agencies to trample on legal procedures. For example, article 33 states that after starting a suit, the defendant must not collect evidence from the plaintiff and the witnesses, but the defendants often take advantage of their position to collect evidence during the litigation. In practice, most decisions are made without any legal basis of or following required procedures. Again, article 50 provides that "the peoples' courts should not apply mediation to the administrative litigation." However, mediation is often used outside the court, which may cause unfair results and further contribute to the low rate of the plaintiffs' success in this type of litigation.

Article 54 stipulates that an administrative action may be reaffirmed if the evidence is absolutely clear; and cancelled if the main evidence is insufficient. Thus it seems that evidence of less importance, albeit insufficient, will not lead to the cancellation of such an action, which will make such an action able to escape the law. Article 61 (3) even provides a possibility that an administrative action, which has broken legal procedures and been rescinded by the courts, may be reached again when administrative agencies re-make

---

<sup>76</sup> Bradley and Ewing, *Constitutional and Administrative Law*, p. 699.



decisions based on the same facts and causes, since the review is focused on substantive conformity (legality) rather than on procedural justice. In theory, once an action is cancelled, whether it substantially or procedurally breaches the law, it is improper for administrative agencies to make the same action as the original one. This will encourage administrative agencies to ignore legal procedures, undermining the function of the ALL as judicial control over the administrative power.

These loopholes in the current judicial review system, together with unrestricted administrative power, become obstacles in implementing the ALL. As a result, some individuals are too afraid to use their right to challenge a governmental agency, and there are many cases that local courts yield under the pressure of governmental agencies.<sup>77</sup> The plaintiffs are usually in a relatively disadvantageous position in administrative litigation, especially in the collection of evidence. Thus justice and the efficiency of the administrative litigation have been hampered by administrative bodies refusing to submit evidence or their delaying in submitting evidence, their collecting evidence illegally, as well as by judges' being partial to and siding with administrative agencies.<sup>78</sup>

From 1988 to 1993, Chinese courts accepted 84,305 administrative cases and ruled 82,129, of which 34.1% were decided to affirm the sued administrative agencies, 20.5% were to order the sued agency to cancel or change the actions, and 35.4% of cases resulted in the plaintiff's withdrawal. In 1995 alone, the Chinese courts decided 51,370 cases, of which 17.34% were to affirm the sued administrative action, 15.82% were to cancel such action and 50.59% were that the plaintiff withdraws the charge against the government agencies.<sup>79</sup>

Based on a close analysis of a great variety of data and cases, Pei Minxin concludes that the focus on the judicial review of "the legality rather than the reasonability of administrative decisions" has prevented Chinese citizens from invoking the ALL to challenge substantive government policies.<sup>80</sup> Potter also points out that the lack of judicial autonomy is also an important factor in the court's persistent bias in favour of the government, as government's greater odds of winning these suits.<sup>81</sup> The ALL stipulates that the Procuratorate may supervise the process of administrative litigation, whereas there are no particulars about its implementation. In China's political system, the Procuratorate itself is subject to the Party and local authority.

---

<sup>77</sup> Chen Dapeng, *China Daily*, 14 March 2002.

<sup>78</sup> *China Daily*, 26 July 2002.

<sup>79</sup> Jiang Ming'an, "Cong renzhi zou xiang fazhi...", *Qiushi xuekan*, no. 6 (1997), p. 59.

<sup>80</sup> Pei Minxin, p. 835.

<sup>81</sup> Pitman Potter, "The Administrative Litigation Law of the PRC..." in Pitman Porter (ed.), *Domestic Law Reforms in Post-Mao China*, p. 288.

"It [ALL] is not a means to limit bureaucratic power and arbitrary administrative behaviour. The courts may only decide the validity of an administrative action, but cannot revise or reverse an administrative decision. Administrative agencies may be protected from judicial review where the law provides that the final resolution of a matter lies in the hands of the agency."<sup>82</sup> This means that a regulation, decision or order is up to the administrative agency which has the authority to decide whether it is legal or proper, because the principle in which whoever makes the law will have the power to interpret it exists in China's legislative practice.

Since China has no tradition of separation of powers, fundamental individual rights have from time to time been dismissed in the name of collective interests during the state administration. The Chinese society has never been really impressed by the doctrine of procedural justice. In practice, means could often be simply justified by ends while expediency would be appreciated just because of its instrumentality. Therefore, the establishment of rule of law and the institutionalisation of administrative law are much more than an introduction of some specific legislation: it actually requires a transformation in legal culture, social behaviour and political structure.

The SCL, which includes administrative and criminal compensation and was enacted in 1995, provides criteria, standards and procedures for state compensation. The difference between the ALL and SCL lies in the judicial process being used in the former while the internal review being applied to the latter. A state compensation may be possible only when firstly the responsible agency confirms its misconduct and then the compensation commission (established in the courts above the intermediate level), approves the application of the affected party.

Over three years since the enactment of the SCL, there were 364 cases of compensation involving government agencies among a total of 870 state compensation cases handled by the courts. During the same period, the Procuratorate handled 762 compensation cases involving judicial agencies, of which 179 were approved.<sup>83</sup> This law provides the right for the citizenry to get financial remedy resulting from state infringement and meanwhile the responsibility for the state to undertake.

However, the SCL is also ineffective in protecting rights and constraining officials because of its narrow scope for application, and low amount and standard for compensation. It does not include legislative compensation, because legislative actions have been claimed as state actions, like national defence and diplomacy, and therefore should be immune from

---

<sup>82</sup> Pitman Potter, p. 288.

<sup>83</sup> Gong Pixiang, *Dangdai Zhongguo de falü geming*, p. 355.

bearing responsibility of compensation. Actions in military affairs and in mismanagement of public utilities are also not included. Civil, economic and administrative decisions in which the courts made mistakes, and abstract administrative actions made by administrative agencies, are all outside the state compensation.

When the compensation is approved, only direct financial losses (lost wages) will be paid without covering other financial losses and psychological losses. Consequently, the law is only restricted to administrative and criminal infringement on personal and property rights. For example, damages to personal freedom are compensated according to annual average wage at the national level of the previous year, not taking into account the victims' actual salary and financial loss; damages to operational losses are compensated based on actual cost, not including actual interest and profit loss. As for loss from wrong fines, the state only compensates the net fine, not the interest.

When coming to the enforcement of this law, even if the compensation is approved, the responsible agency is often reluctant to admit its mistake or refuse to enforce a ruling concluded by the commission. Since there is a sharp inequality between both sides, one being a powerful state agency and the other a governed subject, the effect of implementing this law is very small. In practice, state agencies frequently abuse this system. In most cases, they are reluctant to admit their misconduct and produce obstacles for the investigation: either refusing to provide evidence for its wrong action or presenting itself in the courts, or ignoring the court ruling.

From January 1996 to June 1997, the nation-wide Procuratorate accepted a total of 543 compensation requests, reviewed 397, granted 66, and paid a total of 730,000 *yuan*. Since the state compensation law came into effect, the police at all levels have handled 563 cases and paid 7,810,000 *yuan*. However, there is a big gap between the number of requests for compensation and that being accepted and approved. For example, the courts at the first and second trial declared 2,281 people not guilty in 1996, but only 35 applications for compensation were accepted. The reasons behind this are complicated, including the ignorance of this law both by citizens and judicial organs, and especially the responsible authorities deliberately shunned from accepting any compensation which would affect their performance, and they sometimes even threaten the applicant to withdraw a case.<sup>84</sup>

The state compensation law intends to let the state carry the responsibility of wrongdoing during performing public duties. The problem with this law is that the state is only responsible for one part of official actions rather than all actions, which is much

---

<sup>84</sup> Ma Huide, "Zhidu bianqian zhong de guojia peichang" [The state compensation during the institutional transition], *Xingzhengfa luntan* (5 August 2001).

narrower than the scope in civil law concerning tort compensation.<sup>85</sup> The SCL also standardises legality as the basis of approving a state compensation request rather than the consequences resulting from state actions. In other words, if an official action infringes rights but it does not breach the law, the affected party cannot get compensation. Only when the action has been illegal and also caused infringement and loss to the ruled party, can the compensation be required. Actions that lack fairness or reasonability are not within the jurisdiction of state compensation.

However, in order to hold state agencies accountable for their acts, this law should be based on the consequence rather than illegality. As long as the action causes damage, whether it is legal or not, the state must compensate the affected party. This has particular implications in the judicial process, where the police often detain or arrest people for criminal investigation but later fail to prove their guilt. Some such detentions and arrests are legal since they are conducted according to the CPL. In this case, since the prerequisite for applying for compensation is based on legality, the victims under these coercive measures are not allowed to request compensation. Similarly, the consequence standard is applied to damages caused by public facilities despite the fact that there might be no illegality involved.

The procedures of the state compensation are incomplete and not transparent. For example, judicial compensation requires the judicial organs, which caused damages, to confirm their responsibility for compensation before deciding whether to compensate or not. This obviously goes against procedural justice where nobody can act as the judge in his own case. It is clear that the law is intended for the responsible authorities to correct their mistake in order to save their reputation. However, without an institutional guarantee, this "good" intention can be easily used to cover governmental mistakes. In practice, this procedure requiring the judicial agency to confirm their responsibility has turned the SCL into a "state non-compensation law", as evidenced by the fact that the majority of judicial compensation cases failed to be confirmed by a judicial agency. According to a judge in a county in Yunnan, the law enforcement agencies refused to confirm over 80% of cases of state compensation in this county, leaving no place for the victims to get remedy.<sup>86</sup> This institutional design is unnecessary and should be abolished because the judicial document

---

<sup>85</sup> Qing Ping, "Guanyu guojia peichang fa de wanshan" [On perfection of the state compensation law], *Fazhi ribao*, 27 September 2002, 5 December 2002

(Zhengyi wang, <http://211.100.18.62/fzdt/xwar.asp?id=8168>); Hao Jie, "Guojia peichang anjian youguan falü wenti tantao" [Exploration of the relevant legal problems in state compensation cases], *Renmin fayuan bao*, 2 April 2001, 18 September 2001

(Zhengyi wang, <http://211.100.18.62/fzdt/xwar.asp?id=6068>).

<sup>86</sup> *Nanfeng chuang*, 16 January 2004, 25 February 2004 (<http://cn.news.yahoo.com/040116/55/1yzp7.html>).



itself, such as the judgement of being not guilty, is sufficient as evidence for requesting compensation.

Since the review for compensation is an internal process without participation of the affected parties, the fairness of the result is not guaranteed. Moreover, the compensation committee is established within the court, which is a part of constituting China's judicial system. Due to its close relationship with other agencies, the committee can do nothing more to constrain its "brother agencies" than co-operate or even collude with them. The applicants often cannot afford the increased costs to apply for reconsideration or judicial review of their compensation after the responsible agency refused to confirm its mistake. As regards compensation resulting from wrong adjudication by the courts, China's judicial practice is that the lower courts must accept guidance from and report a case to a higher level court to seek instructions. This will inevitably affect the case to be fairly decided by the committee.

In China, there have not yet been any independent institutions to handle cases relating to judicial compensation. In practice, there is a dilemma in enforcing compensation rulings due to the resistance from the responsible agencies, the lack of funds for compensation and the concern for political merits, etc. Instead of applying for the budget funds used for state compensation from the fiscal department at local level, many responsible agencies either choose to use their own funds to pay the compensation or simply refuse to pay, claiming that there is no fund in the governmental fiscal budget for compensation. They worry more about their reputation, political performance, and promotion than implementation of the SCL.

There is a bizarre phenomenon with respect to state compensation. In many regions, the funds specially allocated for state compensation, has rarely been touched although many cases with state agencies involved in infringement of citizens' rights happened each year. The law does not stipulate what punishment the relevant authorities will receive when they refuse to perform their compensation duty. Since the judicial agencies cannot become defendants under the criminal compensation according to the CPL and SCL, victims, who have been wrongly detained, arrested and sentenced, often find it difficult to get approval for compensation. The appeals for expanding the judicial agencies into the scope of criminal compensation come from both academic circles and some representatives of the NPC. This motion has met strong objection from the judicial authority, especially from the Procuratorate. It claims that it has the constitutional authority to supervise judicial activity, and that to be charged as a defendant in the state compensation would hamper its function.

However, the problem is that administrative agencies in the ALL can be sued as defendants, while the judicial agencies are not under such jurisdiction. Since the constitution

(article 5) stipulates that no organisation and individual may have power above the constitution, the judicial agency must not enjoy such a privilege.

#### **4. Conclusion:**

After the reforms in the late 1970s, the CCP began to increasingly use the law as a significant means in the organisation and operation of the government, and to use legislation for the implementation of its new policies. The importance of legislation and the NPC itself is growing. On the one hand, the Party wants to curb governmental officials' arbitrary actions in order to build a highly efficient administration. On the other hand, this curb is limited and subject to political needs.

As the CCP is still supreme over the law in China, the difficulty remains for Chinese legal reformers to define the relationship between the legislation and the policy. In spite of the relatively complete laws and regulations made in China over these years, there is an important lack of clarity about the power of legislation and the interpretation of the law. It is hard to identify a consistent principle to distinguish the order of various laws. This further poses a threat to the implementation of laws and causes uncertainty of rights and responsibilities. Administrative agencies are practically granted legislative, executive, and judicial powers. However, the rule of law requires administrative agencies to exercise their power in accordance with the law, and the NPC should have the power to check the legality and reasonableness of administrative actions.

In addition, the people's courts have a limited power to review some administrative actions. It is worth noting that because the nature and effectiveness of all kinds of administrative regulations and rules have not been virtually differentiated or explicitly stated, conflict of laws proves to be a serious problem in an administrative law system. The constitution provides the administrative branch with a wide range of power, including making administrative regulations and rules; implementing laws and regulations and rules; interpreting laws and regulations, and reviewing administrative cases.

Judicial review plays an important role in constraining the state agencies and their officials in countries based on the rule of law. The ALL and SCL, as the main part of China's judicial means for control over the political power, are inadequate and confusing. Thus, the administrative legal system, including laws and regulations governing administrative action and responsibility, cannot effectively curb authorities and officials. As a parameter of the rule of law, China's administrative law system is inadequate in legal stipulations and limited in practice for curbing arbitrary governmental actions. The inadequacy and flaws will result in frequent abuse of individual rights and interests granted by the constitution and law.

## Chapter Three: Abuse of Administrative Power

### ---Infringing personal rights and freedom

The rule of law first requires public servants to know, observe and use laws, in order to safeguard individual rights and interests. At present, disorder and inadequacy in China's administrative law system create great difficulty in implementing the rule of law. Since administrative agencies enjoy a wide range of powers, the potential for abuse of power and breach of law is great. Moreover, the lack of supervision and control over state and government power has caused frequent ignorance of and infringement on individual rights and freedoms by state agencies and officials.

The regime has taken various measures to prevent malfeasance among public servants. The revised Criminal Law in 1997 increased the punishment for this crime to fifteen years of imprisonment from five years. The Procuratorate at the national level handled 76,069 cases of malfeasance of government officials over the three years after 1997, out of which 646 officials involved were investigated or punished. Some 26,827 cases remain under investigation, with the officials accused of abuse of power or infringing citizens' personal or civil rights.<sup>1</sup>

In 2001, the Procuratorate investigated 36,447 cases involving administrative misconduct, in which 40,195 officials were convicted of corruption and bribery, recovering 4.1 billion *yuan* of state assets. They included 8,819 cases of dereliction of duty, in which 1,983 cases involved illegal custody, torture, forcibly collecting evidence and retribution against citizens. Other cases of illegal activities were not prosecuted, as when cases were not filed, criminal acts for which there was clear evidence were not investigated, fines replaced imprisonment, punishments were unlawfully reduced, false trials were conducted, and unlawful temporary releases from prison were granted. Torture, extended detention and arbitrary change to sentences also happened frequently.<sup>2</sup>

Overall, economic development has not led to a substantial improvement in governmental behaviour and China's record on human rights continues to be criticised by international communities.<sup>3</sup> Despite new laws aimed at redressing official behaviour,

---

<sup>1</sup> "China Deals Heavy Blows to Malfeasance," *People's Daily*, 1 May 2000 ([http://english.peopledaily.com.cn/200005/01/eng20000501\\_40101.html](http://english.peopledaily.com.cn/200005/01/eng20000501_40101.html)).

<sup>2</sup> *Fazhi ribao* interview with Han Zhubin, the Procurator-General of the Supreme People's Procuratorate, *Fazhi ribao*, 3 March 2002, p. 1.

<sup>3</sup> For example, see Lawyers' Committee for Human Rights (LCHR, now is known as Human Rights First, HRF), *Wrongs and Rights: A Human Rights Analysis of China's Revised Criminal Law* (New York:

political repression and the arbitrary exercise of administrative power remain systematic. There are no signs of fundamental changes in official policies in regard to human rights or in the legal system.

A report about China's human rights published by Amnesty International (AI) in 2002 concluded that during 2001, "thousands of people remained arbitrarily detained or imprisoned across the country for peacefully exercising their rights to freedom of expression, association or belief. Thousands of others were detained during the year. Some were held without charge or trial under a system of administrative detention; others were sentenced to prison terms after unfair trials under national security legislation. Torture and ill-treatment remained widespread and appeared to increase against certain groups. A 'strike hard' [*yanda*] campaign against crime led to a massive escalation in death sentences and executions. The limited and incomplete records available at the end of the year showed that at least 4,015 people were sentenced to death and 2,468 executed; the true figures were believed to be far higher."<sup>4</sup>

The SPP requires the Procuratorate at all levels to focus their investigation of misuse of administrative power on the following four categories.<sup>5</sup> (1) the dereliction of duty and abuse of power by officials above the county level; (2) the practice of favouritism, perverting the law, extorting confessions by torture, and unlawful detention; (3) the misuse of administrative power and irregularities in law enforcement on the part of authorities in charge of economic order and social security; (4) the violation of legal and democratic rights and interests of citizens.

I will examine official abuse of powers in this and the following chapters. In this chapter, after a preview of the position of individual interests in China, my discussion will focus on abuse of personal rights and freedom by the government, such as illegal detention, torture and the lack of redress for victims. The following chapter will deal with issues concerning infringement of property rights.

---

LCHR Publication, 1998). For its online website, see <http://www.lchr.org> or directly go to <http://www.humanrightsfirst.org>.

<sup>4</sup> Amnesty International, *2002 Report—Asia and Pacific—China* (<http://web.amnesty.org/web/ar2002.nsf/asa/china?OpenAmnestyInternational>).

<sup>5</sup> "China Deals Heavy Blow to Malfeasance," *People's Daily*, 1 May 2000 ([http://english.peopledaily.com.cn/200005/01/eng20000501\\_40101.html](http://english.peopledaily.com.cn/200005/01/eng20000501_40101.html)).



## 1. The conflict between individual rights and state interests

One day in July 1999, Yao Li was having lunch with her two female colleagues when an armed robbery took place at the Daqing branch of the Construction Bank, where she worked as a teller. She pressed the alarm, but it was not in working order. She tried to call the police while pretending to look for the key to the cash box, but the telephone was also out of order. The robbers took 13,568.46 *yuan* from Yao's cash box and 30,190 *yuan* from other boxes. When the robbers asked Yao to open the safe, she lied to them, saying that there was no money inside. In fact, there was 250,000 *yuan* in the safe. The robbers believed her and ran away. Yao immediately reported the robbery to the police. The next morning, she repaid the money taken from her cash box from her own savings.

However, the bank dismissed her from her post and cancelled her Party membership on the grounds that she had failed to do enough to protect state interests, although neither the alarm system nor the telephone line to the police proved to be in working order. It was implied that Yao should have stood up and fought the robbers, even at the risk of her life. Yao applied unsuccessfully for administrative redress. She then applied for labour arbitration and won her case. The bank was ordered to repeal its decision.

The bank disagreed with the arbitration settlement and brought the case to the court, but the court supported the arbitration commission. However, in January 2000, the bank defied both the arbitration and litigation, and refused to withdraw its decision, insisting that "there was no failure whatsoever in the alarm system at the bank when the robbery happened, that Yao gave in to the robbers by allowing them to take away the money when her life was not under threat, and it was not Yao who prevented the safe from being opened by the robbers".<sup>6</sup>

This case is only one example of conflict between individual rights and the public interest. Throughout most of Chinese history, ordinary people have been required to sacrifice their own rights and interests for the sake of the state interest. Thus, governmental agencies often ignore people's rights while performing their public functions. In practice, the overemphasis on instrumental facets of the law has led to the neglect of many fundamental individual rights. In the PRC period, rights of citizens are always linked with their duties to the state on the ground that no rights exist in isolation from duties. A right is not inherent or inalienable, but rather something granted by the state and the dominant class.

Article 33 of the constitution states that citizens enjoy some basic rights and freedoms. However, it does not provide any detail of citizens' rights. Since the constitution is

---

<sup>6</sup> This case is quoted in Liu Zuoxiang, "Quanli chongtu: yi ge zhide zhongshi de falü wenti" [The conflict of rights: a problem worth our attention], *Zhejiang shehui kexue*, no. 3 (2002), pp. 54-61.

a political manifesto of the state system, China has in practice no mechanism to enforce its constitution through judicial process. The constitution makes no mention whatsoever of human rights since it is regarded as a bourgeois conception.<sup>7</sup> China is a socialist country in which citizens' rights derive from statutory laws rather than from any divine sources. Therefore, citizens' rights will not necessarily restrict the legislative power of the government. As a political right, citizenship may be restricted or even taken back by the state whenever it feels it is necessary to maintain the social order. This replacement of human rights with citizenship has led China's theory in human rights to an instrumental perspective to serve state, collective, and social interests. "All of these have the potential to be used to restrict individual freedom."<sup>8</sup>

In its response to international criticism about China's human rights record, the Chinese government claims that it recognises the universality of human rights standards stipulated in the UN Universal Declaration of Human Rights (UDHR), but at the same time argues that states must be free to implement these standards according to their specific cultural, historical and political circumstances. China views the international scrutiny of its human rights record as interference in its internal affairs. Meanwhile, it asserts that the principles enshrined in international human rights standards emphasise individual civil and political rights at the expense of collective economic and cultural rights, which are paramount for the Chinese people. China's white papers of human rights published regularly since the 1990s all state that China is still a developing country, and that social stability and state independence are the most important rights, and that the right to subsistence is the most basic right.<sup>9</sup> It has long been taken for granted by the Chinese government that citizens should sacrifice their own rights or even their life for the state when a conflict emerges between individual and state interests.<sup>10</sup> In this case, the bank's decision is simply a reflection of the prevailing ideology and tradition.

In a society based on the rule of law, sacrifice of individual rights is more a moral requirement than a legal one. Although the court followed a current trend to protect personal

---

<sup>7</sup> In early 2004, the revised PRC constitution has provided that the state respect for and protect human rights. However, there is still a long way for this article to be enforced in judicial practice.

<sup>8</sup> June Teufel Dreyer, *China's Political System: Modernisation and Tradition* (London: Macmillan Press, 2000, 3rd ed.), p. 171.

<sup>9</sup> The Information Office of the State Council: "Zhongguo renquan fazhan wushi nian baipishu" [The white paper of Fifty years of the development of China's human rights], issued in February 2000, in *Zhongguo falü nianjian* [PRC law yearbook] (Beijing: Zhongguo falü nianjian chubanshe, 2001), pp. 43-51.

<sup>10</sup> Ibid. For an account of Asian values of human rights, see Michael Jacobsen and Ole Bruun (eds.), *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia* (Surrey: Curzon, 2000); and for a historic account of the development of China's human rights, see

rights, in deciding in favour of Yao, this confusion of law with morality will not be clarified in the foreseeable future in China.

## **2. Administrative detention without judicial procedures**

The belief that individual rights are subordinate to the state's need for maintaining social order and public interests will inevitably give rise to a situation in which legal procedures are ignored and individual rights infringed by law enforcement agencies in the name of protecting public interests. The constitution and national laws have given the public security bureau (the PSB) great power in restricting and taking away individual freedom. According to the Criminal Procedural Law (CPL) and the "regulation of administration and punishment concerning social security" (RAPSS), the police are authorised to maintain social order through criminal detention (which can last up to 10 days, longer than anywhere else in the world), administrative detention (up to 15 days), and arrest. The police also have wide-ranging powers with regard to bail [*qu bao hou shen*, 取保候审] and surveillance [*jianshi juzhu*, 监视居住] of suspected offenders awaiting trial.

In China, a wide variety of administrative agencies have the power to handle "social deviance among the people."<sup>11</sup> The RAPSS have a more important role in people's life than the criminal law. This regulation, which was enacted in 1957 and revised in 1986 and 1994, empowers the police, not the courts, to decide punishments for minor offences. Typically, the PSB and their numerous substations may issue a warning or levy fines up to 200 *yuan* against offenders. They can also impose a detention of up to fifteen days; in practice, this limit is often exceeded many times over. The annual rate for such cases handled by the police amounts to over three million.<sup>12</sup>

However, the police remain unsatisfied. They feel that restrictions imposed by law and judicial agencies seriously hamper their actions. For example, they must follow the CPL procedures and obtain warrants when they want to detain or arrest a person. Besides, according to the administrative penalties law, they may be required to provide a public hearing on administrative detentions according to the RAPSS.

---

Stephen C Angle and Marina Svensson (eds.), *The Chinese Human Rights Reader: Documents and Commentary 1900-2000* (Armonk, N. Y.: M. E. Sharpe, 2001).

<sup>11</sup> Donald C. Clarke and James V. Feinerman, "Antagonistic Contradictions: Criminal Law and Human Rights in China", in Stanley Lubman (ed.), *China's Legal Reforms* (New York: Oxford University Press, 1996), p. 141.

<sup>12</sup> For example, in 1998, the police dealt with 3,232,113 such cases, and handled 3,356,083 in 1999. The State Statistic Bureau: *Zhongguo tongji nianjian* [PRC statistic yearbook] (Beijing: Zhongguo tongji nianjian chubanshe, 2000), p. 752.

The "shelter and investigation" [*shourong shencha*, 收容审查, SI] and "re-education-through labour" (*laodong jiaoyang* or in short *laojiao*, 劳动教养或劳教, RETL) provide convenience for the police to jail individuals without having to justify their detention through the judicial process and other supervision. For many years, these measures have resulted in serious abuse of human rights in China. The two kinds of administrative detention are based on regulations made by the State Council and the Ministry of Public Security, but there have never been any laws in China to empower the PSB to restrict and take away people's freedom under the SI and RETL system.

The constitution does not have any stipulation permitting the PSB at county level to restrict or take away citizens' personal freedom. The constitution also requires that measures against personal freedom must be made by the national legislature only, namely the NPC or its Standing Committee, and no other authority has such power. Article 37 of the constitution explicitly declares that citizens' personal freedom should not be infringed. Both the constitution and the legislative law require that any administrative regulation that conflicts with laws must be repealed. This extension of police power through regulation rather than law has seriously undermined the constitution and legal system. At the same time, legal stipulations about detention and arrest fail to play their role properly. According to an important principle in the administrative law, excessive power or *ultra vires* is illegal, and any administrative regulation on which this illegal action is based must be repealed.<sup>13</sup>

One remarkable feature of contemporary China's legal system is the large number of internal regulations that are unpublished, not transparent and mutually conflict, which encourages officials to disregard formal laws and regulations. This also undermines the integration of the legal system and the emergence of a legal culture. The promulgation of laws aims to form a mechanism for promoting and safeguarding freedom in which, on the one hand, the government will carry out its functions according to law and there are laws for them to follow, and on the other hand, the citizen may effectively scrutinise the government to see that it complies with the law. In this mechanism, the government can justify requiring citizens to act legally, and the citizens are only required to comply with the law. It is a basic principle that the law must be transparent and open to the public, but internal regulations issued by administrative agencies are neither transparent nor open to the public, yet have the status of law, or even superiority over law.



### (1) Shelter and investigation

SI was first introduced in the 1950s to deal with problems arising from the unchecked flow of population from the countryside into cities. However, in 1975 SI was used to "detain and investigate those people who commit a minor crime and who commit crimes away from their home place".<sup>14</sup> The SI system originated from a social welfare policy to provide temporary accommodation for beggars or vagrants until they were sent back to their original hometown or village after their identity and address were checked out. It was formally adopted in 1961, managed by local civil departments and enforced by the police.<sup>15</sup>

The State Council instructed the PSB to set up particular shelter centres at regional cities. In 1979, the Ministry of Public Security made a series of stipulations regarding SI, and in 1980 the State Council issued a notice about the incorporation of SI and forced labour into RETL (hereinafter refers to the 1980 notice). According to this notice, the new system was extended to include mainly three categories of people, that is, those who commit minor crimes, those who commit crimes away from their home place, and those who conceal their real names and addresses and have an unclear background or origin.

After SI was incorporated into RETL, it has no longer been used to deal with the unchecked flow of population as was originally intended. Since then, the three notices, the 1980 notice and other two issued in 1985 and 1991, are major legal basis of SI for the police to handle minor criminal suspects in urban areas. Thus SI became an added measure to be taken in criminal investigation, and its original function as a means of providing social welfare for beggars and vagrants who migrated into cities from rural areas was then replaced by a system known as "shelter and repatriation" [*shourong qiansong*, 收容遣送], which will be discussed as a separate issue later in this chapter.

SI, together with RETL, in practice, has become a great abusive means for the police to arbitrarily restrict and take away people's freedom. Before being incorporated into the revised CPL in 1997, SI had been widely used as a form of administrative detention. By this system, the PSB is authorised to detain people without charge for up to three months, merely on the suspicion that they may be involved in crimes, such as prostitution and drugs. Since

---

<sup>13</sup> Arts 5 and 67 (7) of the constitution.

<sup>14</sup> "Guowuyuan guanyu jiang qiangzhi laodong jiaoyang he shourong shencha liangxiang cuoshi tongyi yu laodong jiaoyang de tongzhi" [The State Council's notice of the incorporation of compulsory labour and shelter and investigation into re-education through labour], adopted in 1961. In *Zhonghua renmin gongheguo falü quanshu* [The complete collection of the PRC law] (Changchun: Jilin renmin chubanshe, 1989), p. 1582.

<sup>15</sup> In 1961, the Central Committee of the CCP approved "Guanyu jianjue zhizhi renkou ziyou liudong de baogao" [The report on a firm prevention of free flow of the population], which was made by the Ministry of Public Security and the Ministry of Internal Affairs, in *Falü Quanshu*, p. 1582.

the 1980s, several hundred thousand people have been detained every year under this system. In 1991 the PSB reportedly stated that there were 930,000 such cases in 1989 and 902,000 in 1990.<sup>16</sup> In some regions, 30 to 40 percent were held beyond the permitted limit of three months.

Local PSB organs expanded the scope of SI at will so that almost anyone might be detained under this system. Among the detainees, some were not beggars or vagrants but local residents with valid urban household registration cards; some were criminals and should have been detained or arrested according to the criminal law; some had only breached administrative law without criminal elements; some were loitering suspiciously in public places such as dock or railway stations; some were involved in economic disputes; and some were suspects who could not be arrested because of insufficient evidence.

In the 1991 notice, the MPS admitted that the scope of SI was too wide and detention was too long. It was often used to replace criminal detention, investigation and punishment. Some PSB detained people as required by other state agencies. People were detained for only making minor mistakes, breaking transport rules, remarrying without divorcing their first spouse, committing adultery, illegally cohabiting, breaching state policy on birth control, driving without a licence, or even being mentally disabled. Around 70% of the cases under SI should not have been handled as criminal acts.<sup>17</sup>

Since economic reforms began in the late 1970s, China has become an increasingly money-oriented society. Encouraged by the slogans that "to get rich is glorious", people across China strove with each other to develop regional or departmental enterprises and improve their life. The police, like other governmental agencies, took this opportunity to exercise their influence and power in pursuit of economic benefits. A short cut for them to take was to impose administrative fines on people. Police fines enriched the police individually and collectively. Some police even went so far as to make up cases to "expand sources of income" [*chuangshou*, 创收]. There soon arose a new type of business known as a "law-enforcing economy" [*zhifa jingji*, 执法经济] in China.

Most of those held under SI are less educated or less privileged. They are not released until they pay the fines. Regulations as how much they are fined vary from person to person and from case to case; usually the police have the final say. SI is also used to detain political dissidents and parties in economic disputes, and to coerce them into confession when there is no substantial evidence to justify arresting them under the criminal

---

<sup>16</sup> Lawyers Committee for Human Rights, *Criminal Justice with Chinese Characteristics* (New York: LCHR Publications, 1993), p. 70.

<sup>17</sup> *Zhonghua renmin gongheguo falü quanshu (zengbu ben)* [A complete collection of PRC laws: an newly-added edition] (Changchun: Jilin renmin chubanshe, 1993), p. 1153.

law. This form of administrative detention circumvents the minimal guarantees of due process recently incorporated into Chinese law, and violates both Chinese law and international law.

Typical of this are cases generally known as "virgin girls commit prostitution" [*chunü maiyin an*, 处女卖淫案], which have frequently been exposed in the press and attracted a wide attention over recent years. There is much in common between these cases. The victim is usually a young woman. She is detained on suspicion of prostitution by the police, who torture and humiliate her until she admits committing being a prostitute and gives the names of her customers. They then release the woman and fine her so-called customers. Later medical checks show that the young woman is still a virgin, and the victim appeals to the press or local authorities for justice. Such cases are not taken seriously by the PSB until superior officials intervene.

One such case happened in Jingyang, Shaanxi, in January 2001.<sup>18</sup> At around 8 in the evening, Ma Dandan, a 19-year-old woman, was watching TV together with some customers in a hairdressing salon owned by her sister when suddenly two men in plain clothes, who claimed to be policemen but produced no warrant of arrest or search, took Ma away by force into a van. Ma was detained in Jianglu police substation, where the two policemen interrogated her in turn for the whole night. They even hung Ma from a basketball post outside in the chilly winter wind, beating and kicking her until 4 am the next morning. She was then taken back into a closed office to be "ideologically educated" [*sixiang jiaoyu*, 思想教育] by the head of the police station for half an hour. Ma was tortured physically and mentally, and almost lost consciousness. Finally, Ma signed a prepared confession and was released at 7 the next evening. A few days later, the Jingyang county PSB announced an administrative decision against Ma, in which Ma was described as a male who had been detained and punished for visiting prostitutes.

Ma applied to the county PSB for an administrative redress. The bureau made the hospital staff exam Ma's hymen twice [which breached her privacy]. The medical check proved that Ma was still a virgin. Under pressure from the press, the bureau reluctantly took disciplinary measures against two policemen, although they had violated criminal laws and should have been punished accordingly. The first trial of this case at the county court resulted in the defendant being ordered to pay Ma compensation of only 74.66 *yuan*, which amounted to her pay for two day's work. Upon further appeal, the compensation was increased to 9,135 *yuan* but at the same time her request for a public apology and

---

<sup>18</sup> *Hua shang bao*, 21 March 2001, p. 1; *Nanfang doushi bao*, 23 March 2001, A17.

rehabilitation were refused. The case was thus closed, but the harm done to Ma, body and soul, would likely remain with her for the rest of her life.

It needs to be pointed out that Ma's case is only one of many.<sup>19</sup> Many such cases fail to come to light because of interference from law enforcement agencies and also because of the ordeal endured by women. Of the known cases, quite a few "virgin prostitutes" were tortured and forced into fabricating a list of their "customers". The men on the list were then tracked down, detained and heavily fined, or forced to run away from home and hide elsewhere for years without returning home for fear of being persecuted. What is worse, some of them were divorced by their wife and even sacked by their employers because of the unfounded charge of visiting prostitutes.

For example, in November 1998, in Baishui, Shaanxi, a 19-year-old woman confessed that she had illicit sexual relationships with over 50 men, and named them at random. Most of the listed men were found to be non-existent, but the other on the list were detained, beaten, and fined. After they were released, they took revenge not on the police but on the victim's family for being wronged. When the police later found the list to be faked, they took the woman back, detained her for much longer than stipulated in laws or regulations, and beat her again. She then narrowed the number down to 16. The police conducted a door-to-door search for these 16 men. Some escaped and the remaining were detained, beaten up, and forced to pay heavy fines. Some were divorced by their wives. They then sought revenge against the young woman's family.

There are common features in cases of this type: (1) the police assumed the women to be guilty in the first place; (2) they breached procedural justice by failing to follow legal procedures and using torture; (3) their tough action against these young women were more motivated by economic interests than maintenance of social order. In these cases, the women were treated as criminals with deep humiliation. Some of them were tortured physically and sexually attacked when detained by the police. They lost their freedom and dignity, and they were left with nothing to prove their innocence but their body. "If a woman can only prove her innocence by presenting her naked form (i.e. her hymen), stripping of clothing and dignity, her redemption is even more shamed, a burden of shame borne by the whole population, including all men."<sup>20</sup>

---

<sup>19</sup> For more reports of such cases, see *Zhongguo xinwen wang*, 28 May 2002 and 23 December 2001 ([www.chinanews.com.cn](http://www.chinanews.com.cn)); *Renmin ribao*, 21 December 2001 ([www.peopledaily.com.cn](http://www.peopledaily.com.cn)); *Chutian doushi bao*, 4 August 2001, p. 1; *Zhonghua wang*, 2 December 2002 and 14 December 2001 ([www.china.com](http://www.china.com)).

<sup>20</sup> Li Fang, "Yisibugua de qingbai bu shi ren de qingbai: ping Henan 'chunü maiyin an'" [It is not a person's innocence hung by a thread: a discussion of the case concerning virgin prostitution in Henan], *Zhongguo qingnian bao*, 10 June 2002, p. 7.



If a man were wrongly accused of visiting a prostitute, how can he prove his innocence without the evidence of a hymen? If a married woman is accused of prostitution, how can she prove her innocence since she is not a virgin? Many people are wronged and lose their cases because they cannot produce "hard evidence" to convince the police. Under this system, anyone can be found guilty if she/he cannot prove his/her innocence in a convincing way, and no one can feel secure when the police can override the law and arbitrarily detain a person. One victim has reported the police saying, "If I beat you, what can you do to me? At worst, I will get the sack."<sup>21</sup> This shows that some police have no respect for law and basic human rights. However, in these cases, when a PSB decision was challenged, the police defended themselves vigorously. For example, in March 2002 in Yancheng, Jiangsu, a young woman was forced to confess to prostitution and was sentenced to serve six months of re-education through labour. On the way to the labour camp, she threw out a letter to her father, saying that she had been tortured into making a false confession. When two lawyers retained by her father asked to meet her in the labour camp, their request was rejected by the camp guards on orders from the PSB.<sup>22</sup>

Later, the lawyers went to see a senior PSB official in charge of legal affairs, asking for the case to be reconsidered. The official refused, claiming, "Firstly, our bureau is very serious about this case and has already called on six meetings to study it; secondly, the fact of being a virgin does not prove that she did not perform prostitution. Could not she satisfy her clients by means of masturbation or oral sex? Thirdly, our cadres and police are of good character. Extracting confessions by torture is a high-tension wire for us, so they would not have taken this risk." Finally, the lawyers and journalists who investigated the case gave it up after receiving threatening telephone calls.

Although efforts are occasionally made to rebuild public confidence in law enforcement, most come to no avail. One reason is that there are no clearly defined and strictly observed laws regarding the scope of the power of state agencies. In most cases, these agencies collaborate in the name of protecting the interests of the state, because individual rights are negligible. Secondly, the police usually enjoy more power in Chinese legal practice than judges and procurators, and once the police decide a suspect guilty, it is very difficult to reverse their decision. Thirdly, there is almost no restriction or supervision of police powers. Finally, law-enforcing agencies are more often than not linked by common interests.

---

<sup>21</sup> *Renmin ribao online*, 21 December 2001(<http://www.peopledaily.com.cn>).

<sup>22</sup> *Ibid.*

All these factors combined together render the court or procuratorate neither able nor willing to offend the police by reversing their decision even when the evidence is found to have been obtained illegally or is inadequate. With almost unrestricted power, the police infringe citizens' rights without fear of being investigated and held accountable. Moreover, the court treats with great care cases in which corrupt law enforcers are involved. When members of the police are found guilty, they are usually dealt with according to administrative penalties rather than criminal law. When they are finally sentenced, the court is quite lenient towards them. In the foreseeable future, there is not much of hope of improving this situation.

In recent years, China has achieved a great deal in lawmaking by international standards. The problem in China, however, is not that there are no laws but that law enforcers do not abide by laws, and sometimes even violate laws. Many abuses to people detained under the SI system, as we have seen, arise from the unrestricted power of administrative agencies in the disguise of maintaining social stability. SI is completely manipulated by the PSB alone. There were no judicial reviews of SI cases until 1990 when the administrative litigation law for the first time was expanded to cover SI. Before this, individuals unlawfully detained under this system had no place to seek remedy. The new revised CPL, which was put in effect in 1997, requires that the police should follow CPL procedures and accept prosecutors' supervision rather than only follow internal decisions if they want to SI a person. Those originally subject to SI can now be detained for a maximum of 37 days before approval must be obtained from the prosecutor for formal arrest. In practice, however, the police frequently breach the laws and regulations in regard to detention and custody. As Amnesty International observed, "the police [in China] still have the power to detain the same categories of people without charge and without judicial review," and "the human rights violations which have characterised 'shelter and investigation' may continue".<sup>23</sup>

China has not acted to abolish the regulations on SI, namely three internal notices issued by the administrative agency, even if it is cancelled as an administrative detention. The incorporation actually legalises the police and state security bureau actions in using SI to detain political dissidents and religious cults without charge by setting a time limit for detention in the revised CPL. At the same time, the PSB have resorted more and more frequently to another more "effective and secure" system known as RETL of handling minor criminals and ideological dissidents.

---

<sup>23</sup> Amnesty International, *China: Law Reform and Human Rights: Not Far Enough*, 28 February 1997 ([http://www.oneworld.org/amnesty/press/28feb\\_china.html](http://www.oneworld.org/amnesty/press/28feb_china.html) ).

## (2) Re-education through labour

RETL is a form of administrative detention which is usually combined with SI to sentence minor criminals to labour camps for a fixed period. Both measures are similar in terms of functions and procedures, the only difference between them being that SI is unlawful detention while RETL is illegally forced labour. The PSB has the power to place suspected offenders in detention centres or labour camps without a court order. Under the RETL system, the term of forced labour on camps can last as long as four years.<sup>24</sup> Labour camps are notorious for harsh labour conditions and torture.

In addition of 1957 regulation, the State Council issued "Guanyu laodong jiaoyang de bucong guiding" [The supplementary regulation on RETL] in 1979. In 1982, the MPS issued "Laodong jiaoyang shixing banfa" [The method of enforcement of RETL] and revised it in 1989. An enforcing method of 1982 regulation was issued in 1992, titled "Laodong jiaoyang guanli gongzuo zhifa xizhe" [The enforcing particulars for managing RETL work]. Above three administrative regulations are only guidance for the PSB to carry out RETL work. This system, which started in 1957, has been used to detain minor criminals, political dissidents and members of unrecognised religious groups.

As described in a report issued by Amnesty International,<sup>25</sup> Tong Yi is a prisoner of conscience, serving a two-and-a-half-year sentence of re-education through labour, without charge or trial. She had acted as assistant and translator for Wei Jingsheng, the political dissent famous for his role in the Democratic Wall Movement in the late 1970s. She was taken into custody days after revealing to the foreign press that Wei had been seized by the police on 1 April 1994, and was sent to Hewan Labour Camp in Wuhan, Hubei, in January 1995. Shortly afterwards, she was brutally beaten by two inmates who were camp "trustees", according to a letter to her mother smuggled out of the camp. She said she was being forced to work 15 hours a day in order to fulfil production quotas. Tong Yi complained to camp officials about the beatings, but they took no action to protect her. The following day, more than 10 women prisoners beat her again, leaving her face and body swollen and covered in bruises.

Members of her family were warned that they would lose their jobs if they tried to make her complaints public. In July 1995 Tong Yi's mother was told she could no longer visit her daughter and that her daughter would be transferred to Shayang RETL farm in

---

<sup>24</sup> *Zhonghua renmin gongheguo falü qianshu*, 1989, pp.1574 and 1583; *Guowuyuan gongbao*, no. 26 (1992), p.1055.

<sup>25</sup> Amnesty International, *China: No One is Safe: Political Repression and Abuse of Power in the 1990s* (London: Amnesty International Publications, 1996), p. 76.

Hubei, where "forceful measures" would be used against her, if Tong Yi persisted in working no more than the legal maximum of eight hours per day.

The official figures show that about 150,000 people are held in labour camps at any one time.<sup>26</sup> In Guangzhou alone, over 9,200 people were placed in labour camps in 1999.<sup>27</sup> Since 1989, hundreds of dissidents and members of religious or ethnic groups have been detained under the RETL system. According to official sources cited in 2002 annual report by Amnesty International, some 260,000 people were detained through RETL in early 2001, a substantial increase on the number officially reported in 1998. The use of this form of arbitrary detention increased particularly against Falun Gong practitioners since 1999 and during the "strike hard" campaigns against crime.<sup>28</sup>

Liu Wenping was a Falun Gong follower in Liaohe, Liaoning. When doing Falun exercises on the Great Wall, she was arrested and sentenced to three years of RETL. She was tortured and forced to sign a prepared statement renouncing her beliefs and then released in 2000. She was arrested and sent to the labour camp again in 2001. This time, she suffered even harsher physical and mental abuse. She was tied to an open, barred window for a day and night in November, but she still did not give in. She was then sent to a psychiatric hospital for treatment after a mental collapse caused by the endless torture. In 2002, after she was permitted to go home, she committed suicide by jumping from her flat.<sup>29</sup>

With its inherent incompatibilities and conflicts with the Chinese constitution, the law [especially the legislative law and the administrative penalties law] and international conventions for human rights, RETL does not comply with the requirement of the rule of law.<sup>30</sup> According to the UN Body of Principles for "The protection of all persons under any form of detention or imprisonment", no one may be kept in detention without being given an

---

<sup>26</sup> *Zhongguo falü nianjian* [The law yearbook of China] (Beijing: Zhongguo falü nianjian chubanshe), various vols. throughout 1989 and 2001.

<sup>27</sup> *Yangcheng wanbao*, 13 September 2000

(<http://www.ycwb.com/history/96/2000/09/13/ycwb/zhxn/1.html>).

<sup>28</sup> China rarely declares the figures in these areas. But according to some unofficial or overseas sources, since July 1999 when the CCP started to crack down the Falun Gong, a total of 100,000 members have been sent to the labour camps, and over 600 have been tortured to death. See Falungong website: *Minghui wang* (<http://huiyuan.minghui.org/html/articles/2003/3/607.html>); and *Qingzhou wang* (<http://qingzhou.sytes.net/news/shownews.asp?newsid=6613>).

<sup>29</sup> For a detail report of this case, see <http://media.minghui.org/gb/case/liuwenping09252002.html> and <http://minghui.ca/mh/articles/2002/10/27/38733.html>.

<sup>30</sup> There has been much discussion over the legality of RETL. See Shen Fujun, "Guanyu feichu laodong jiaoyang zhidu de sikao" [A reflection of abolishing RETL system], *Faxue*, no 7 (1999), pp. 18-20; Lin Xiaochun, "Laodong jiaoyang zhidu de gaige" [On reforming the RETL system], *Faxue yanjiu*, no 5 (1997), pp. 114-117; Zhang Shaoyan, "Lun laodong jiaoyang lifa de jiben xingshi" [On the general situation of making laws regarding RETL], *Fazhi ribao*, 20 February 2001, p. 1; Liu Jian, "Lun Zhongguo laodong jiaoyang zhidu yu guoji renquan gongyue de conggu ji tiaozheng" [On conflicts of China's RETL system with international conventions for HRs, and adjustments of RETL],



effective opportunity to have his or her case heard promptly by a judicial authority.<sup>31</sup> The detainee has the right to be held according to the law, the right of access to lawyers and family members, and the rights to not be subjected to forced labour.<sup>32</sup> RETL is also conflict with Chinese law. As an administrative penalty, detainees are sentenced to heavy labour in harsh conditions and deprived of freedom from 6 months to one or three and even four years. The infringement of personal freedom often exceeds that in criminal punishment.<sup>33</sup>

There are no rules governing the procedures in carrying out RETL and the management of this system. An individual may be sentenced to years of hard labour without court trial and access to lawyers, and all this can be through the closed door by administrative agencies. The RETL management commission is composed of heads of the police, judicial, civil welfare and labour departments. It entrusts the police to carry out both approval and enforcement of a RETL decision, and the procuratorate has no supervision over it. Thus, the commission performs no function in this mechanism.<sup>34</sup>

Many cases concerning RETL are difficult to challenge under the current administrative redress and litigation law. The PSB tends to assess the police by the number of cases they handle and reward the police according to how many cases have been brought to a close. This encourages the police to detain as many people as they can, since RETL cases do not go through the legal procedures required under formal arrest. As a result, many innocent people are detained under RETL, while at the same time some criminals are protected.<sup>35</sup>

The practice of RETL also shows that the administrative power overrides the authority of the constitution and law. Only the police have the power to make such a decision on how long a person is sentenced to RETL. RETL is neither a criminal punishment nor a measure of education but a grey area between criminal law and administrative regulation.

RETL has been in effect since 1957. As the conflict between RETL and the rule of law has become more and more apparent, many people, including the famous legal scholars

---

*Xiangtan daxue xuebao*; posted at *Kan Zhongguo*, 26 May 2003 (<http://www.secrechina.com/news/articles/3/5/26/43360.html>).

<sup>31</sup> The principles adopted by the UN General Assembly 43/173 on 9 December 1988, see <http://www.hric.ca/uninfo/treaties/36.shtml>.

<sup>32</sup> *Ibid.*

<sup>33</sup> See Liu Jian and Shen Fujun, *supra* note 30.

<sup>34</sup> Dang Guoqing, "Qian tan laodong jiaoyang xuexiao" [A brief discussion of the RETL schools], *Zhongguo fazhi bao*, 29 April 1985, p. 3.

<sup>35</sup> Tang Shimin, "Qian tan Zhongguo laodong jiaoyang jinxing gaige de biyaoxing" [A brief discussion of the necessity of reforming China's RETL system], *Dongfang fazhi wang*, 21 September 2002 (<http://law.eastday.com/epublish/gb/paper10/1/class001000001/hwz582109.htm>).

Ma Huide and Chen Xingliang, have advocated its abolition.<sup>36</sup> However, there are still some who regard it as an effective means to maintain social stability during transition periods. They advocate strengthening rather than abolition.<sup>37</sup> A third group proposes its reform and legalisation through legislative procedure, in order to transform it something resembling magistrates' courts in England.<sup>38</sup> The future of the RETL system is still uncertain, but it is arousing increasing concern among academic circles and the general public.

### (3) Shelter and repatriation

SR [*shourong qiansong*, 收容遣送] is a civic welfare mechanism designed to provide aid for homeless people in urban areas. It began with a 1982 regulation made by the State Council concerning "the method of shelter and repatriation of beggars and tramps in urban areas." Local civil agencies are required to set up shelters with governmental funds to provide basic living facilities for such people. The local police are responsible for carrying out sheltering and repatriating them.

Since the mid-1980s, there has been an ever-increasing gap in wealth between the rich and poor, the east and west, and the city and countryside. The redundancy of labour in rural areas has long been a serious problem. To make matters worse, the requisition of farming land by local authorities to develop village and town enterprises has left many landless, and the only way out for them is to look for work in large cities. Every year millions of peasants migrate into the cities, leading to the collapse of the policy of restricting labour migration in effect since the 1950s. A document known as No. 48, titled "A proposal concerning reform of problems in shelter and repatriation work", was issued in 1991 to extend the current SR system to cover people "without three papers" [*san wu ren yuan*, 三无人员], who are so called because they have no ID cards, no temporary residential card and no work permit.

<sup>36</sup> Song Lu'an, "Laodong jiaoyang yin yu feichu" [RETL should be abolished], *Xingzheng faxue yanjiu*, no 2 (1996), pp. 26-31; Zhao Bingzhi, "Zhongguo xingfa xiugai ruogan wenti" [Some problems concerning the revision of China's criminal law], *Faxue yanjiu*, no 5 (1996), pp. 6-54.

<sup>37</sup> Bi Xusen, "Cong lishi kan laodong jiaoyang de shuxing" [A study of the nature of RETL from a historical perspective], *Zhongguo laodong jiaoyang*, no 2 (1999); "Laodong jiaoyang gongzuo zhi neng jiaqiang buneng xueruo" [RETL can only be strengthened rather than weakened], *Fazhi ribao*, 3 August 1997, p. 1.

<sup>38</sup> Liu Renwen, "Laodong jiaoyang zhidu jiqi gaige" [RETL system and its reform], *Jiancha ribao*, 4 May 2001; Chu Huizhi, "Lun jiaoyang chuyu de helixing" [A discussion of the rationality of education through a magistrature], *Zhongguo laodong jiaoyang*, no 3 (1999); "Jinkuai wei laodong jiaoyang lifa" [The legalisation of re-education through labour must be put on the agenda], *Nanfang zhoubao*, 21 September 2000, p. 13; Wang Zhonghuan, "Zhiding you Zhongguo teshe de shourong jiaoyang fa tansuo" [A exploration on making a law concerning shelter and education with Chinese characteristics], *Shandong faxue*, no 1 (1998), pp. 48-49.

SR has been used nationwide to deprive several million people a year of their freedom without any judicial process. Local authorities have also issued similar regulations to deal with local problems in relation to people without three papers, and often the scope of this application is even wider than that in Document No. 48. SR has become another source of abuse of HRs, as reported officially and unofficially. Some people are put into SR simply because they walk along the street in a "suspicious way", as in the case of an 80-year-old man in Shenzhen, who was sent to the shelter station in February 2001.<sup>39</sup>

Some people are even tortured to death under this system. For example, in October 1994, Zhang Sen, a 25-year-old man was taken to the shelter by the police when he was walking along a street in Guangzhou when was stopped and asked to show his residence permit. Although had a permanent job in Guangzhou, he was not carrying his residence permit with him. Although it would have been very easy to check up on his identity because he had a bank card issued by the Construction Bank of China, he was detained and sent to a shelter. His uncle, Zhang Sen's only relative there in Guangzhou, was contacted and asked to pay 200 *yuan* for his redemption, but Zhang had been transferred to another shelter when his uncle came to pay the money. Later, the redemption was increased to 800 *yuan*, but Zhang was transferred again before his uncle arrived at the second shelter. When his uncle finally saw him, Zhang was already dead from an inside beating, and his body showed signs of massive injuries.

In order to cover up the cause of Zhang's death at the shelter, the doctors were instructed by the authorities to tell Zhang's uncle that the body must be cremated at once, or he would be unable to collect the ashes because the body would be disposed as unidentified.<sup>40</sup> Zhang's uncle then signed the cremation certificate. Since the evidence of Zhang's death had been destroyed, the court rejected the charge brought by Zhang's parents against the SR agencies.

In this case, the victim should not have been subject to SR according to the relevant regulations. Although Zhang had not brought his residential card with him, he had a stable job and a fixed residence in Guangzhou. It seems that the only reason he was stopped was that he seemed to be a migrant (he was a member of the Zhuang ethnic minority).

On some important occasions, such as National Day and Spring Festival, or during campaigns for improving the city's image, many people would be put into SR in order to clear the streets of those deemed undesirable by urban authorities. The vast majority of them

---

<sup>39</sup> See *Boxun*, 4 February 2001

(<http://peacehall.com/news/gb/yuanqing/2001/02/2001020420151.shtml> ).

<sup>40</sup> "Shourongsuo li jianzhuang qingnian liqi siwang" [A robust young man died oddly in the shelter centre], *Zhongguo qingnian bao*, 27 August 2001, p. 7.

are ordinary migrant workers. Others held in shelters include street children, homeless people or people who are mentally ill or disabled. They are first locked up in SR stations and then sent away under police escort to their hometown or village. For example, on 26 November 1999, the police in Beijing brought in 4,167 persons for sheltering. On the eve of New Year's Day, the Beijing authorities mobilised a police force of 9,940 persons and allocated as many as 123 train compartments to repatriate the so-called people without three papers.<sup>41</sup> It is estimated that hundreds of thousands of people spent their National Day in more than 700 SP detention centres across the country in 1999.<sup>42</sup>

In many places, SR measures against people without three papers have turned out to be a highly profitable business or even a source for gang crime. The practice of charging SR fees on detainees has encouraged the police to hold as many people as they can. In some SR stations, corrupt police and criminals have even conspired to sell sheltered women for prostitution.

The Xuzhou Civil Bureau set up a transfer station for sending people back home under SR in a small village to the west of city Xuzhou, Jiangsu. In collaboration with the villagers, the station management made the transference of SR people into a profitable business. The villagers first bailed the SR people out of the station and detained them in their houses. The men were held for ransom while the young women were sold into prostitution. The village and the station soon made great profits.<sup>43</sup>

This system has long been hidden from the public because most of its victims are poor and obscure. They can be detained at the whim of the police because they supposedly sully a city's image and pose a potential threat to social stability. This is a flagrant abuse of human rights, and reflects the fact that China's rural dwellers remain second-class citizens. Campaigns are regularly launched on festival occasions every year in Chinese cities to clear public places of people without three papers and drive them back to their home village. Rather than maintain social stability, the SR system has caused widespread resentment among migrants from rural areas.

Recently there has been much criticism of the SR system from scholars and the public as more and more SR cases are exposed in the press. They call for a re-assessment of this system on the grounds that according to the legislative law, regulations concerning

---

<sup>41</sup> *Renmin ribao*, 20 December 2000, p. 9.

<sup>42</sup> Human Rights in China (HRIC), "Not Welcome at the Party: Behind the Clean-up of China's Cities-a Report on Administrative Detention Under "Custody and Repatriation," 29 September 1999, in *Hong Kong Voice of Democracy website* ([http://www.democracy.org.hk/EN/sep1999/mainland\\_19.htm](http://www.democracy.org.hk/EN/sep1999/mainland_19.htm)).



compulsory restriction of personal freedom must be enacted by the NPC.<sup>44</sup> But until the implementation of the legislative law, State Council's two documents issued in 1982 and 1991 on which SR is based remain effective in practice although it is already in conflict with law.<sup>45</sup>

### 3. Torture for confession and miscarriage of justice

Although torture is strictly prohibited by law in China, it is very common in detention centres and prisons to extract confessions or to intimidate and punish suspects and prisoners. Torture most frequently occurs when people are held in administrative detention, since this is outside the judicial process and beyond the scope of public monitoring.

Torture in detention centres, prisons and labour camps is sometimes carried out by inmates against other inmates at the instigation of, or without interference from, officials. People detained in these stations are classified into different groups according to their performance and attitudes. Those who have "reformed well" are better treated and often assigned the task of supervising their cellmates. They are allowed to enjoy some freedoms and privileges which are denied to their fellow inmates. As a reward for carrying out the tasks, they are even instructed to carry out torture against "hardened bad guys", particularly ideological dissidents.

According to Amnesty International, torture in SI and RETL institutes is epidemic and extreme. Death from torture happens frequently. The mismanagement of SI facilities also resulted in the death of 28 people through torture in 1988 and eight deaths during the first three months of 1989 alone.<sup>46</sup> In Henan alone, it is reported that 41 prisoners and innocent suspects died as a result of torture during interrogation between 1990 and 1992.<sup>47</sup> Party criminal policy is that confession is dealt with leniently, but resistance is dealt with severely. This policy encourages confession, exposing collaborators and repentance. Since 1989, it is believed that torture has been used more and more frequently as means of punishing political and religious dissidents. It was reported in 1995 that 412 cases involving

---

<sup>43</sup> In the first major case resolved in Beijing involving forcing teenage girls into prostitution, it was found that many were sold right from this village in Xuzhou. See *Renmin ribao*, 12 October 2001 (<http://www.people.com.cn/gb/guandian/26/20011012/579606.html>).

<sup>44</sup> Arts. 8 and 9 of the PRC Legislative Law, for a full print version, see *Zhongguo falü nainjian* [Law yearbook of China] (Zhongguo falü nainjian chubanshe, 2001), pp. 257-263.

<sup>45</sup> SR was abolished in June 2003 and replaced with a new system known as "shelter and aid" [*shourong jiuzhu*, 收容救助], after Sun Zhigang, an university graduate, was reported to have been beaten to death in a shelter station in Guangzhou. This tragic death triggered a national appeal for abolishing this system.

<sup>46</sup> See chapter 4, "Torture and Impunity," in *China: No One Is Safe*, pp. 63-78. For a recent detail report of cases in this type, see Amnesty International, "Torture—A Growing Scourge in China—Time for Action", 12 February 2001 (<http://web.amnesty.org/library/index/engasa170042001>).

torture, 4,627 cases involving illegal detention and other illegal cases involving infringing personal freedom were investigated.<sup>48</sup>

Countless other cases are believed to have been ignored or covered up by officials. It is difficult to assess the extent of torture quantitatively, but there is evidence, as shown above, to indicate that torture is widespread, systematic and far more serious than suggested in official reports. In many cases, the police often illegally torture suspects into confession. This is because that the government attaches greater importance to maintaining public order and suppressing political opposition than to observing legal norms and protecting individual rights.

The PSB tend to assume suspects are guilty, and feel justified in using torture to extract confessions. Victims of torture often lose faith in the law and the legal system. For example, in October 1986, Xing Wei's pregnant wife was murdered at home in Yingkou, Liaoning. Xing was regarded as the suspect in spite of insufficient evidence.<sup>49</sup> He was tortured for three days and nights, and his mother was held in the detention centre. He was forced to confess and sentenced to life imprisonment. During his time in jail, he appealed against the sentence hundreds of time but he was only released in 2000 when the real murderer was caught.

Another case involving Qian, director of the Agricultural Bank of Zhaodong, Heilongjiang, who was stabbed in August 1994. Sui Hongjian, a colleague of the victim, was targeted as the suspect, and his two brothers and one cousin were regarded as accomplices. During the investigation and trial, the four suspects plus twelve other family members were detained for a total of nearly 19 years.<sup>50</sup> While these adults were in custody, their 11 children aged between 3 and 14 were left alone at home without parental care for almost one year. The four main suspects were sentenced to five years imprisonment and served their full term in 1999. In early 2001, the real criminal was caught. The Sui brothers then appealed to the relevant authorities for justice and compensation on the following grounds.

First, when the police notified Sui Hongjian and other three that they were being held under SI at the Zhaodong detention centre, they did not present any documents or give any explanation. A special case team [*zhuan'an zu*, 专案组] was formed to interrogate Sui in turn day and night. The police said to Sui: "It is definitely you who has stabbed Qian. You must admit your crime." "It's for your benefit to make a full confession. Now your father, brothers, sisters and wife are all in custody. If you confess, they will be set free so that the

---

<sup>47</sup> *Henan fazhi bao*, 7 October 1993, p. 4.

<sup>48</sup> Zhang Siqing, then SPP Chief-Procurator, "SPP working report", in *Zhongguo falü nianjian*, 1996, p. 119.

<sup>49</sup> *Fazhi ribao*, 22 December 2000 (<http://www.legaldaily.com.cn/10791.htm>).

children in these families will be looked after.” Under great pressure, Sui Hongjian finally agreed to sign his name and put his fingerprint on a confession prepared by the police.

The other three suspects were forced to confess in a similar way. Later, the police wrote a detailed report of the case stating that after a quarrel with Qian over work, Sui Hongjian resolved to take revenge on Qian. He called on his two brothers and one cousin to kill Qian, but the plan miscarried. The police were praised by the local press for their "quick and effective resolve of a murder case despite lack of clues and evidence." The case seemed to have been officially closed.

But things did not go as the police had wished. The suspects were put on trial four times, retracting their confession at each trial. At the first trial in September 1996, Wu Zhengrong, a lawyer and member of the Standing Committee of the NPC, launched a defence for the four suspects, and the case was adjourned for a second trial. The second trial was conducted in 1997, but the court made no decision; instead, it reported the case to the Suihua Intermediate Level Court (SILC). The latter reviewed the case and ruled that it should be retried because the facts were unclear and there was insufficient evidence.

During the judicial process, the police adopted coercive measures against 10 witnesses, and detained one of them for over 5 months to force him to give false testimony. A third open trial of this case was held in November 1998, in which all the witnesses for the prosecution overturned their previous statements. Chen Dewang, a witness aged 75, told the court: "I joined the Party even before the founding of the PRC. I will take any legal responsibilities for my testimony. My statement given in October was not true. The police forced me to give false testimony. They brought me to the detention centre and made me sit in a chair for two days and nights. They did not let me sleep. Whenever I dozed off, they would drag my ears, not allowing me a moment of sleep. They would not have released me if I had not signed the testimony they wrote in advance. They even threatened to send me to prison. I am a Party member. If I am lying, you may shoot me at once outside the court."

The court still found that the four suspects were guilty on the grounds that their confessions corresponded with each other, disregarding the fact that the four suspects and witnesses repeatedly withdrew their confessions and testimony. The court stated that there was no evidence to prove that the police had used torture to extract the confessions. Thus, the four suspects were sentenced to four to five years of imprisonment for intentional murder. In January 1999, the four defendants appealed to SILC. The case was tried for the fourth time, resulting in a lighter sentence of three years' imprisonment for deliberate injury. They

---

<sup>50</sup> *Shenghuo bao*, 31 August 2001, p. 5 and *Fazhi wencui bao*, no. 741, p. 1.

were set free in August 1999 after serving their reduced term. When they left jail, they were found to be suffering serious bodily injuries.

Sui Hongjian appealed again in 2000 to SILC to rescind the previous judgement. At this time, the real offender was caught in Harbin in another criminal case. In 2001, Sui's appeal attracted the attention of the Heilongjiang Political and Legal Commission, and the Provincial Higher Level Court (PHLC) instructed SILC to reinvestigate this case and bring it to a fair end within two weeks. In its report, SILC stated the reason why its ruling for retrial failed. "Our court contacted prosecutors many times requiring a review of this case. They admitted that some doubts existed in the case relating to investigation and trial, but that they found it difficult to rescind the decision because if Sui and his brothers were regarded as innocent, then there would be, first of all, an investigation of the police having used torture for confession and fabricating reports. Our court suggested that the prosecutor investigate police torture since this issue was beyond our jurisdiction, but the prosecutor claimed that he could not do so unless authorised from the relevant agency. Thus the retrial of the case was postponed."<sup>51</sup>

It is worth mentioning here that two other similar cases also happened in Zhaodong. A worker, Zhao Naiwen, was killed outside a public toilet in Zhaodong in November 1994. His fellow worker Yang Yunzhong was targeted as the suspect. Although Yang consistently denied the charge, he was sentenced to death penalty in 1996, but in 1998 his sentence was changed to death with two years' suspension, and finally to life imprisonment. At the same time, Yang's parents and a classmate were placed on probation for covering up his crime.

Another case involved a railway worker, Shi Yansheng, who borrowed a tape from a local video shop in December 1993. During the same night, the janitor of the shop was murdered. Shi Yansheng was detained as a suspect. He and six members of his family were detained for a total of 5,105 days. In November 1994, Shi Yansheng was sentenced to death with two years' suspension. In 1999 SILC ruled that Shi Yansheng was not guilty and set him free because of unclear and insufficient evidence.

The Chinese government has signed the UN Convention against Torture (CAT) in 1988, and the Criminal Law also contains articles concerning torture. However, the definition of torture is significantly different from that of the Convention in several respects. First, torture in the Criminal Law (CL) refers mainly to two types of acts: using torture to "coerce a statement"; and subjecting imprisoned persons to corporal punishment and abuse for this same purpose.<sup>52</sup>

---

<sup>51</sup> *ibid.*

<sup>52</sup> Arts. 136 and 189 of the PRC Criminal Law.



By defining torture narrowly as the use of force to "coerce a statement," the concept of torture in Chinese law falls short of the requirements of the Convention.

Second, the penalties prescribed for torture in the CL are relatively light compared to those for other crimes. Torturing to coerce a statement usually only merits a fixed-term sentence of no more than three years or criminal detention ranging from 15 days to six months. Torture that results in disability or death is subject to a penalty of over three years of fixed-term imprisonment. Third, there is no mention of psychological torture in Chinese law. Some articles in the General Principles of the Civil Law (GPCL) address the issue of mental damage, but they are not applicable to psychological torture. In fact, solitary confinement, a common form of psychological torture, has been employed in excess of legal time limits to punish those who supposedly are not willing to submit to "education" and "reform."

Fourth, under the CPL, investigation of the crime of torture is to be handled exclusively by the procurators. The Supreme People's Procuratorate (SPP) established various standards to determine whether particular torture cases should be prosecuted, which further define the concept of torture described in the CL. In these standards, two elements are of primary importance in determining how a case should be handled. The first is the intention of the torturer: if he carries out the act for personal ends or in revenge, the case should be investigated. The second is the end result of the torture: an investigation should only be initiated if the torture caused disability, death or other serious consequences. Such a narrow definition of torture compounds existing ignorance and appears to encourage officials not to view torture as a serious matter. One reason that evidence obtained from torture is used in court may relate to an official theory on which evidence is based called "seeking truth from facts" [*shi shi qiu shi*, 实事求是]. This means that each piece of evidence should be examined according to whether or not it is a fact, regardless of its origin. This principle means that if a piece of evidence is proved to be true through the trial process, it is to be considered as legal evidence even if it was obtained illegally. In practice, the use of evidence obtained from torture at trial is common practice in the Chinese judicial process. The police are not held responsible for torture and excessive detention as long as the suspects are finally proved guilty. Although the Chinese criminal law states that a defendant's statement is not necessary for the determination of whether a criminal act has been committed, oral confession occupies as high as 70% in China's criminal process.<sup>53</sup>

The emphasis on social order and stability also influences official tolerance towards torture. Attitudes toward criminals are closely related to a social system in which all persons

---

<sup>53</sup> Tian Wenchang, "Guanyu xingxunbigong de shenceng sikao" [An intensive study of distracting confession by torture], *Fazhi raibao*, 6 November 2002, p. 6.

are subordinate to the needs of the state. Defendants and witnesses must respond to interrogation from the investigating and trial authorities.

In these circumstances, the assumption of innocence, which was first introduced in the 1997 criminal law, has not made any difference to the mentality of judicial officials. The legitimacy of torture to extract confession has a long history in both pre-modern and modern China. Many ordinary people as well as officials believe that the use of torture for criminals is wholly justifiable. Whenever the regime perceives itself to be under threat, it is likely to launch campaigns to maintain law and order, and suppresses all kinds of criminal and semi-criminal behaviour. The media report all criminal cases and the authorities exert pressure on judicial agencies to resolve the case quickly. The PSB particularly enjoy a great power in maintaining social security and thus many abuses including torture are related to them.

When the assumption of innocence was transplanted into China's criminal legal system, the process was only partial. Other related concepts such as the right to silence, strict surveillance over interrogation through CCTV and tape-recording, the presence of defence lawyers at the interrogation, and the exclusion of evidence extracted by torture, were not introduced. The prosecution is not obliged to prove that torture is not being used in extracting confession. The low incidence of witnesses giving evidence in the court means that oral confessions are rarely challenged in court.

Thus the new lie-detection machines introduced after the new criminal law came into force have not had much practical impact. The judicial agencies still tend to regard suspects as guilty, and torture is an easy way for them to get other evidence in order to resolve the case. They do not trust the lie detectors and rarely use them. The rate of bail remains as low as 10% because it remains in the hands of the police whether or not to grant bail according to legal stipulations.<sup>54</sup>

In principle, confessions extracted under torture should be supported by independent evidence before a conviction can be made. Where there is no supporting evidence, cases are usually returned for supplementary investigation or retrial. However, the courts, which are under heavy pressure from the media and the authorities, would rather make a wrongful conviction than wrongly set a suspect free. In such a case, the court must bear responsibility for unlawful convictions. In cases of supplementary investigation and retrial, the fact that the suspect has already been detained for a long period also affects the chances of a fair trial in that the compensation would be correspondingly heavy. All these factors affect the annual assessment of the judiciary. In the end, the court often sentences the detainee for a period

---

<sup>54</sup> "Ershiyi shiji fazhi he qu he cong?" [What course to follow for the rule of law in the 21<sup>st</sup> century?], *Fazhi ribao*, 26 December 2000, p. 3.

similar to his actual detention or continued his detention without sentence, even if he is innocent.

In Chinese law, defendants are not permitted access to lawyers in the preliminary stage of the investigation, which is the time when torture is most likely to take place. In one county during 1990, 67 defendants withdrew their confession when their cases went to trial. This accounted for 39 percent of total cases surveyed in this county.<sup>55</sup> In these cases, the major reason for the defendants' retraction was that they had confessed only in order to avoid further torture. Although the 1997 CPL permits lawyers to meet with detainees in the presence of police officers "following the first interrogation", the specifics are left undefined. In practice, from both my observation and information provided by the Bar Association, it remains at the discretion of the police and procuratorate whether lawyers are permitted to meet a suspect at an early stage of the investigation, since the revisions contain no guarantees for such access. Suspects are still in custody for long periods without any monitoring.

Even if defence lawyers finally participate in the case, they are not really able to play the same role as their Western counterparts. There is plenty of evidence that lawyers' involvement in trials is subject to the control of Party Political and Legal Commissions (PLC) at all levels. In political cases and cases in which defendants plead not guilty, lawyers are required to submit their defence statements to the Bureau of Justice in advance for approval. In cases brought against the use of the torture, defendants are generally state officials and the charges would likely be regarded as damaging to the image of state organs. For this reason, lawyers representing the victims of torture and their families often encounter a great deal of obstruction from the local Party and administrative officials.

In sum, the incomplete conception of torture and other failures in the legal system, including the lack of an independent judiciary, the denial of the suspects' right of early access to lawyers and the acceptance of evidence obtained through torture by the courts, creates many opportunities for torture in China's criminal justice. Under the influence of central and local Party PLC, many torture cases have been handled in an overly tolerant manner. The courts generally have imposed light punishments on perpetrators and the prosecutors have often exempted abusive police from prosecution.<sup>56</sup> Furthermore, in order to

---

<sup>55</sup> Ibid.

<sup>56</sup> For example, Zhao Baohong was 21 years old when he was suspected of rape in 1999. He was detained for 98 days, during which he was beaten, resulting in his nose and teeth being broken, his toenails tore off, and his genitals so badly damaged that he became impotent. The police used boiling water and electric prods to beat his genitals for four hours until he confessed his guilt. When the real rapist was caught, Zhao was released. But when Zhao asked for legal punishment for police who tortured him and the procuratorate also filed prosecution against these police, the court rejected the

cover up any incidents which could damage the image of the security organs, the CCP ordered in 1986 that any media reports concerning the PSB and any other state functionaries had to be approved by the CCP Central Committee or its local committees before release.

Thus the Chinese authorities have failed to introduce the most basic safeguards to prevent torture, or to bring many torturers to justice. Safeguards against torture in law are manifestly inadequate and anyone detained or arrested is vulnerable to such treatment. The government's approach to investigating and prosecuting cases of reported torture is arbitrary and inconsistent, offering impunity to members of the PSB who carry out torture. This suggests that torture often results from institutionalised practices and official policies.<sup>57</sup>

#### **4. Insufficient State Compensation**

In a society based on the rule of law, citizens are entitled to state compensation when their rights are infringed by state agencies. In China, however, the individuals whose personal rights and freedoms are infringed by a state agency may not be compensated sufficiently or at all. Since individuals' private rights and interests are all subject to the public interest, state compensation is more symbolic than real. Shortcomings in compensation law mean that in practice there is little to discourage state agencies from infringing people's human rights.

Since the PSB and other state agencies are not adequately monitored, victims who file complaints to the court to review an official action are rarely granted compensation. Sometimes lodging a complaint may bring only further abuse and infringement. Many other administrative fiats are not under judicial check even if they are conflict with the constitution and NPC laws. Judicial reviews are limited in both scope and effect, as is also state compensation.

The PSB has a dual responsibility in maintaining public order and conducting criminal investigations. According to law, if a suspect detained by the police is transferred to the procuratorate for prosecution, and the latter brings a prosecution against the suspect to the court, then the police action is judicial (conducting a criminal investigation), and is immune from judicial review. But if a suspect is not brought into the judicial process, then the police action is regarded as administrative (maintaining public order), and is subject to judicial review.

---

case by issuing a verdict stating that the prosecution exceeded the time limit, and that police torture was not necessarily a prosecutable action. In a later appeal, the police were sentenced to two years' imprisonment with two years' suspension. Zhao's request for civil compensation was rejected. The police remained at work in the judicial sector until July 2001. See *Boxun*, 4 December 2001 ([www.boxun.com.hero/bigoing/4-1.shtml](http://www.boxun.com.hero/bigoing/4-1.shtml)).

<sup>57</sup> James C. F. Wang, *Contemporary Chinese Politics: An Introduction* (6th ed.), Chapter Six: "Reform for a Creditable Socialist Legal System," (Upper Saddle River: Prentice Hall, 1999), p. 3.



The following cases demonstrate how China's state compensation works in practice. In November 1992, Zhao Bijian and three other men in Chongqing were detained on suspicion of committing a crime. Zhao Bijian was forced to confess his "crime" to the police, but later he withdrew his confession. In 1999 the court decided to acquit the four suspects and set them free the next year. Zhao Bijian asked for 200,000 *yuan* in compensation for the economic and psychological damage sustained as a result of wrongful detention, but he was only awarded 70,000 *yuan* covering his direct economic loss, namely his lost wages.<sup>58</sup>

Shi Yansheng was wrongly charged with robbery in Heilongjiang and was sentenced to death with two years' suspension (in effect, to life imprisonment). Seven family members including his mother were charged with obstruction of justice and were detained for a total of over five thousand days. Shi himself had lost nearly 14 years of freedom by the time the real criminal was caught. However, his compensation was only 6,000 *yuan*, one *yuan* for each day.<sup>59</sup>

In June 1995, Wang Chunyu was arrested in Tieli on suspicion of rape. His alleged victim, who was unsure of the identity of the attacker, set fire to Wang's factory in a random revenge. Her arson led the police to target Wang as her rapist. In May 2000, the Tieli procuratorate dropped the charge against him because of insufficient evidence, and Wang applied for compensation. The first court hearing ruled that he was not entitled to full compensation on the grounds that he had "deliberately made a false confession".

In 2001, the Yichun Intermediate-Level Court accepted Wang's second application, but decided to compensate Wang for only the 345 days' extended detention after he was wrongly arrested, excluding the previous 210 days' detention at the police station before a formal charge was laid. The court stated that Wang could not obtain compensation for the pre-arrest period because he could not provide evidence to prove that his confession was by torture or entrapment as required under article 17 of the State Compensation Law. This article stipulates that "where citizens deliberately make a false confession or forge other evidence to prove a crime, which results in their detention or punishment, they are not entitled to compensation."

In these cases, the prosecutors apparently know that the evidence for the charge is insufficient or even internally inconsistent, but they still decide to prosecute and approve the arrest. The stipulation about a false confession is unfair because the suspects are not

---

<sup>58</sup> This amount was based on a notice issued by the SPC Compensation Commission Office in 2000, known as "Guanyu zhuanfa guojia tongjiju fuhan de tongzhi" [The notice of forwarding the reply issued by the State Statistical Bureau]. The notice provides that economic loss should be determined according to the annual average wage per worker in the previous year. This amount in 1999 was 8,346 *yuan*. Other costs were not included.

<sup>59</sup> *Fazhi ribao*, 4 February 2001 (<http://www.legaldaily.com.cn>).

voluntarily undergoing interrogation or confession. A false confession usually happens when a suspect is in custody and subject to coercive measures. The problem here is that the charge of "deliberately making a false confession" is vague, and it is not clear which party is responsible for producing a "false confession". This vagueness has been used by some judicial agencies to escape legal liability for infringing citizens' rights.<sup>60</sup>

In other words, in Chinese courts, if a person makes a false confession, then the arrest was not wrongful and no compensation is due; but if a person does not make a false confession but is in fact guilty, then the arrest is not wrongful, and therefore even more no compensation is due. No matter what the circumstances, a person is responsible for the way in which he/she is treated. The only infringements caused by administrative agencies that are included in state compensation are arbitrary detention, arrest and sentence during the judicial process. Article 17 of the SCL provides that a detainee who has committed a minor offence (less than a felony) is not entitled to compensation. The question of compensation arises only when a law-enforcer breaks the law and causes damage to a person. In practice, this article seems to convert the SCL into a law which rules out compensation since it is difficult for a victim to prove that a law-enforcer has breached the law.

In the period from the 1990s up to the end of 2001, the people's courts handled nearly 440,000 administrative cases and 2,566 cases for state compensation, thereby safeguarding the legitimate rights and interests of those citizens and enterprises.<sup>61</sup> There was an increase in this type of litigation over that decade. But the increase in this type of case is much lower than that in other types. For example, the Shenzhen Intermediate-Level Court only handled 13 cases for compensation in 2001, involving 500,000 *yuan*. Of these cases, 9 were awarded compensation involving a total of 418,000 *yuan*. Since 1995, this court has accepted 31 such cases and settled 28, of which only 13 cases were compensated. The highest compensation awarded by this court was made in 1993, when a person was wrongly charged with rape. He was granted compensation of 70,000 *yuan* for the financial loss but received no compensation for his emotional suffering and damage to his reputation. Nationwide, a total of 1,300 suspects were found not guilty at the first trial or on appeal in a single year in the mid-1990s, but only 30 persons got compensation.<sup>62</sup>

Citizens who are detained or arrested for crimes that they did not commit usually suffered both financially and psychologically. Even if the state compensation is sufficient to

---

<sup>60</sup> *Fazhi ribao*, 6 September 2002, p. 8.

<sup>61</sup> Information Office of the State Council, "Zhongguo renquan fazhan wushi nian (baipishu)" [White paper on the fifty years' development of China's human rights], in *Zhongguo falü nianjian*, 2002, p. 49.

<sup>62</sup> Ma Huide, "Guojia peichang fa san ren tan" [A discussion of the SCL among three people], *Fazhi ribao*, 14 January 2001, p. 2.

cover financial loss, there is little or no compensation for psychological damage. The purpose of judicial review of administrative action and state compensation is to provide a remedy for individual suffering resulting from official misconduct. The other purpose is to punish governmental agencies and their personnel for unlawful actions. Such mechanisms are crucial for building a state based on the rule of law. If the punishment for governmental agencies was inappropriate, for example, the compensation awarded to the victim was too low, which would increase administrative arbitrariness and abuse. On the other hand, if the compensation for death as a result is high, it would put heavy pressure on the government to reduce such cases. Thus, despite an immediate increase in the state budget for high amounts of compensation, in the long term, there would be substantial savings in the total amount of compensation at the same time as rule of law would be strengthened.

## **5. Conclusion**

The cases discussed above are only a small proportion of rampant abuses of HRs by state agencies. Government agencies, especially the PSB, enjoy a wide range of discretionary powers which have a direct impact on citizens. In the name of reducing crime and maintaining social order, the police frequently abuse citizens' human rights through illegal detention, wrongful arrest, and torture. Punishments made under two administrative measures, SI and RETL, are often longer and harsher than that under criminal law.

Although these cases differ from each other in detail, they have some common features. Firstly, the police detain or arrest suspects while ignoring legal procedures such as presenting their IDs, warrants, and other documents. Secondly, they ignore the principle of assumption of innocence. They assume a suspect to be guilty and treat him or her as a criminal from the beginning. They try every possible means including fabrication of evidence, entrapment and torture to force a suspect to confess.

Third, the police demand co-operation from the suspects and their family members without any respect for their human rights. In order to resolve the case, the police extend illegal measures to suspects' family members and even to witnesses. Fourth, the PSB are the most powerful of the three judicial organs. The procuratorate has weak supervision over the PSB, and the courts are far from being independent in upholding and maintaining justice. In order to protect the authority of the state judicial organs, they often co-operate and even collude.

Finally, even when a case cannot be solved due to insufficient evidence, the suspect may remain detained without charge or sentence for long periods. It is common for case files to be returned to the police for re-investigation or to the original court for retrial because of

unclear facts and insufficient evidence. However, these judicial organs which are responsible for further investigation and correction either ignore the requests or make excuses for their failure to produce sufficient proof, irrespective of a suspect's suffering and social justice. The failure of China's legal system in guaranteeing a fair and just trial leads to large scale violation of suspects' legal rights, which have seriously undermined the authority and reputation of the legal system and people's belief in and respect for the law.

In theory, the administrative litigation law permits a person to challenge the legality of his/her detention, torture, and wrong sentence. In practice, however, lack of access to legal counsel inhibits the effective use of this law to obtain prompt judicial decisions. There are thus no rights to silence for detainees and the rate of bail is low. Especially when the police use internal regulations to exercise SI and RETL, they disregard or circumvent limits on detention since there is poor supervision over these administrative measures. The scope for administrative litigation is narrow and the victims face great difficulty even in bringing cases to court.

The state compensation law provides a legal basis for citizens to recover damages from illegal treatment. Although the majority of the Chinese people remain unaware of this law, there is evidence that it is having some impact. However, the weakness in this law and its enforcement has failed to protect individual rights. In sum, neither administrative redress nor state compensation can effectively protect citizens' rights and restrict official behaviour under current circumstances.



## **Chapter Four: Abuse of Administrative Power**

### **--- Infringement of Property Rights in China's New Marketplace**

It is widely believed that a market economy requires property rights to be well defined and be enforced with sufficient predictability. In order to protect property rights, legal guarantees are necessary, including a Weberian legal and rational mechanism required for fostering and promoting a market mechanism. It is particularly crucial in the transition to a market economy that the government redefines its function and gradually eliminates its interference. That is to say, the government must exercise its power in accordance with the law and serve the market actors as an impartial third party, and the judiciary must have the authority to restrict administrative arbitrariness.

According to a senior U.S. judge and scholar, a state which wants to establish a legal infrastructure centred on the protection of property rights may start by carrying out essential legal reforms either through precise defining legal rules rather than leaving these rules open-ended, or through focusing on the elevation of its judiciary. Any way, according to him, will result in "a virtuous cycle" to economic development and further reform of the legal system.<sup>1</sup> In China, legal reform is primarily designed to provide an effective legal framework for the market economy. In order to establish a market economy, the definition and protection of property rights is essential. In China, such rights are uncertain, unpredictable, and poorly recognised. The main reason for the poor development of property rights may be attributed to ideological and political constraints on modifying the ownership system.<sup>2</sup> The need for redefining property rights has been frequently reiterated since the introduction of economic reforms, but this task has been hampered by the political and economic sensitivity of reforming huge unprofitable state-owned enterprises (SOEs) and the land ownership system. For a long time, the Chinese concept of rights was closely connected with the state and collective interests, leading to the neglect and rejection the concept of property rights.

With fast emergence of diversified interests from the economic reforms, there have been many disputes involving property rights. Scholars like Liu Junning, Ji Weidong and Zhang Weiying have called for a revision of the constitution and laws in order to build up a

---

<sup>1</sup> Richard A. Posner, "Creating a Legal Framework for Economic Development", address at the World Bank Workshop on Legal Reform on 14 April 1997, *World Bank Research Observer*, 13:1 (February 1998), acc. 3 January 2001 (<http://wbro.oupjournals.org>).

<sup>2</sup> Jean C. Oi & Andrew G. Walder (eds.), *Property Rights and Economic Reform in China* (Stanford: Stanford University Press, 1999), p. 13.

network of legal protection for various property rights. They advocate the acknowledgement and protection of property rights as the cornerstone for establishing a market economy.<sup>3</sup> Although the government and some laws emphasise protecting property rights enjoyed by all kinds of market actors, there are no constitutional and institutional safeguards for doing so. Therefore, governmental agencies and officials at all levels remain ignorant of this right and continue to interfere in market operations. Infringement of property rights in a newly emerging marketplace is widespread.

The main types of infringement are: (1) infringing farmers' property rights to land contracts through, for example, forceful land appropriation without legal procedures and fair compensation; (2) infringing various enterprises' rights and interests through intervening in their autonomous operation and imposing arbitrary penalties; (3) hampering free market competition through control over many important industries, which restricting the development of private property rights and infringing the interests of general public.

### 1. Farmers' property rights to land contracts

PRC land is divided into two parts: state-owned land in urban areas and some rural land expropriated by the state according to law, and collective-owned land mainly in vast rural areas. Since the economic reform began, villagers have had the right to contract a piece of land [*tudi chengbao jingying quan*, 土地承包经营权], and they are entitled to use the assigned land to grow crops or vegetables, but they cannot dispose it, for example, to transfer or sell it. According to the 1999 revised land law, farmers as a whole have collective land ownership, and the Collective Economic Organisations [*jiti jingji zuzhi*, 集体经济组织] or Villagers' Committees [*cunmin weiyuanhui*, 村民委员会], and Villagers' Groups [*cunmin xiaozu*, 村民小组] are entrusted to manage and administer collective-owned land.<sup>4</sup> It is unclear whether these three institutions also have ownership rights to land, and it is nowhere stipulated that they can legally represent farmers' collective rights, exercise ownership rights or reap the profits from ownership.

<sup>3</sup> For example, Ji Weidong, "Zhongguo xianfa gaige de tujing yu caichanquan wenti" [The problem of property rights and the way of China's constitutional reform], *Dangdai Zhongguo yanjiu*, no. 3 (1999), pp. 26-53; Zhang Weiyong, *Qiyue de qiyejia: qiyue lilun* [Enterprises' entrepreneurs: contract theory] (Shanghai: Shanghai renmin chubanshe, 1995), chapter three; Liu Junning, "Feng neng jin, yu neng jin, guowang bu neng jin: zhengzhi lilun shiye zhong de caichanquan yu renlei wenming" [The wind can come in, rain can come in, but the king cannot come in: property rights and human civilisation in the perspective of political theory], in *Gonggong luncong: zhiyou yu shequn* [Public forum: freedom and the community] (Beijing: Sanlian shudian, 1998), pp. 141-148.

<sup>4</sup> Arts. 8 and 10 of *Zhonghua renmin gongheguo tudi guanli fa* [PRC land management law], effected in 1 January 1999. In Luo Haocai and Sun Wanzhong (eds.), *Zhonghua renmin gongheguo faku* [A comprehensive collections of PRC laws] (Beijing: Renmin fayuan chubanshe, 2002), vol. 7, Administrative Laws : part four, pp. 4865-4874.

The land law defines the ownership of rural land as shared between three holders: the Villagers' Committee, the villagers' group, and the township. Like state ownership, it is not clear who is legally entitled to the ownership of land. Thus, this law still leaves collective ownership unresolved although it gives the impression of having done so. The main reason for vague collective ownership is the sensitivity of this topic. As Peter Ho notes, the central government fears a clarification of land ownership will cause great increase in land disputes and thus affect social stability.<sup>5</sup> With the economic reforms progressing, many weaknesses in this legal structure have been revealed. The imprecise definition of collective ownership is the underlying cause of arable land loss, as basic level government such as township or county governments sell land for profits in the wave of land development.

In practice, it is the village committees that act as the representative of collective ownership, co-operating with the township or county government to exercise land appropriation. This assignment of land property rights leads to conflicts between lower-level government and farmers. As Xiaolin Guo concludes, local county and township governments show a great initiative to enforce land expropriation in order to gain promising revenue while showing not much interest in renewing land contracts, and the difference of revenue in land development shows "why the central policy on the renewal of land contracts was postponed while land expropriation was so enthusiastically pursued."<sup>6</sup>

It maybe reasonable for vague regulations regarding land contract system due to the changeable situation in the economic reform, but "the deliberate nature of the institutional ambiguity becomes apparent in the ownership shifts of collective land."<sup>7</sup> It is obviously that to define land ownership as "collective" is comply with socialist ownership system, and if farmers become the owner of their land, the whole privatisation in rural area will start. In terms of vast size of China's countryside, this will bring great concern to the regime of rural disorder and damage to socialist ideology. However, this vagueness of collective ownership has resulted in continuous land expropriation and breach of farmers' land contract in the name of land planning and construction. China's farmers in fact have not property rights to their land.

Land reform in China does not adopt widespread privatisation as some former socialist countries do, according to Ho, rather, it is conducted from top to down controlled by the government with limited freedom in land market, allowing only leasing and transferring

---

<sup>5</sup> Peter Ho, "Who Owns China's Land?--Policies, Property Rights and Deliberate Institutional Ambiguity", *The China Quarterly*, no. 166 (June, 2001), p. 407.

<sup>6</sup> Xiaoliu Guo, "Land Expropriation and Rural Conflicts in China", *The China Quarterly*, no. 166 (June 2001), p. 438.

users' rights to land.<sup>8</sup> Thus the regime attempts to promote economic growth while at the same time not sacrificing the existing ideology regarding state and collective land ownership. This attitude will make it difficult to resolve the problem underlying land system.

The expropriation of rural land for urban construction and rural development has become a serious concern since land reforms started in the late 1980s. Millions of *mu*<sup>9</sup> of farm land has been commandeered. The recession in rural industry and financial pressure on local governments have also prompted the growth of "development zones" in county and town levels<sup>10</sup>.

According to the land law, land expropriation is a governmental action and should be exercised by the government at county level or above.<sup>11</sup> The purpose of this action is for public interests in need of constructive land both in urban and rural areas, and the user of expropriated land must pay compensation for his action according to the standard in land law. At the same time, however, the state law empowers governments at all levels to make particulars for carrying out land expropriation in terms of actual conditions of their regions. Abuses of this stipulation are common. In practice, individual officials, town and village authorities, and even the construction units of a project, have made such requisitions.<sup>12</sup> According to the head of the State Land Bureau, Pan Mingcai, the main forms of such illegal practices include requisition of land without superior approval, excessive requisition, approving requisition beyond legal authority, and illegal transference of the requisitioned land for other uses at a high profit.<sup>13</sup>

Coercive measures by the police and other agencies are often used during the appropriation process, such as banging on the doors late at night to force farmers to sign unfair compensation agreements, roving around in utility vehicles in the fields destroying crops, and even detaining "*diaomin*" [canny and crafty people, 刁民] according to local officials. For example, in 2000, a town government in Zhejiang sent the police to forcibly appropriate a total of 453 *mu* of cultivated land for a housing development. In 1999, village cadres in Gansu sold 119 *mu* in batches for building a private factory. A town in Hunan took

---

<sup>7</sup> Peter Ho, p. 400.

<sup>8</sup> Ho, p. 396.

<sup>9</sup> A traditional unit of area; one *mu* is equal to 0.165 acre.

<sup>10</sup> Xiaoliu Guo, p. 424.

<sup>11</sup> Art. 40 of 1988 Land law, in Editorial committee for textbook of legal science (ed.), *Zhonghua renmin gongheguo changyong falü quanshu* [A complete collection of PRC laws] (Beijing: Falü chubanshe, 1988), pp. 504-512; and art. 46 of 1999 land law.

<sup>12</sup> Chen Fang, "Qi ke lanyong zhengdi quan: yi fen zhengdi de diaocha" [How could the right of requisition of land be misused: a survey of land requisition], *Ban yue tan*, no. 18 (2002), p. 36.

<sup>13</sup> *Ibid.*



over a total of 2,000 *mu* within four years, of which 250 *mu* of arable land was treated as "wasteland".<sup>14</sup>

Under the 1988 land law, the legal standard for compensation for loss of crops was three to six times the value of the average annual output of the land calculated over the three years prior to expropriation.<sup>15</sup> Under the 1999-revised law, the amount of compensation has increased to six to ten times the value.<sup>16</sup> In practice, however, the compensation for land appropriation was always at the lowest rate provided by law. In some places, compensation was not given directly to each household whose land was taken, but was distributed among towns, villages and villagers' groups and even paid in arrears.

For instance, the Fuzhou municipal government accumulated 40 million *yuan* of unpaid compensation for appropriated land over four years. In August 2000, the Jinzhou government in Hubei appropriated over 300 *mu* of land from a village in Shashi to build a highway which had no approval from the State Council. The compensation was 6,000 to 8,000 *yuan* per *mu*, although according to the average annual production over the three previous years, the income from per *mu* of appropriated land was around 30,000 *yuan* per *mu*.<sup>17</sup> In Longyou, Zhejiang, several hundred *mu* of land, originally a prosperous and environmentally-friendly market garden, was taken away from farmers, and the compensation was 625.9 *yuan* per *mu*.<sup>18</sup> However, the price per *mu* actually was over 12,000 *yuan* per *mu* according to law and the local rate. The actual value per *mu*, in terms of the market demand for vegetable produce, was even higher than the stipulated standard.

As a result of massive and continuous land expropriation, huge numbers of rural people lost their livelihood without the possibility of alternative employment. At the same time, the state and local government agencies imposed heavy taxes and levies in the countryside. These governmental actions have caused frequent conflict between rural areas and local administrations, even leading to outbreaks of violence. Farmers consider that the government has deprived them of their basic living resources without fair compensation. They accuse the local administrations of exercising power without authority. Riots in rural areas have been frequently reported in recent years.<sup>19</sup> Farmers have become the most underprivileged group in contemporary China, their interests frequently infringed by almost

---

<sup>14</sup> *ibid*, p. 37.

<sup>15</sup> Art. 27 of 1988 land law.

<sup>16</sup> Article 47 of 1999 revised land law.

<sup>17</sup> *Boxun*, 8 January 2002 (<http://www.boxun.com.cn>).

<sup>18</sup> "Dianfu fading zhengdi buchang biao zhun" [To overthrow the legal standard of compensation for land acquisition], *Renmin fayuan bao*, 9 October 2002 (<http://www.rmfb.com>).

<sup>19</sup> For example, farmers in Willow Gully, Shandong, had a violent conflict with law enforcement officials during protesting forceful tax collection. *The Independent*, Thursday, 4 April (2002), p. 14.

all other sectors of society. It seems that rural areas and farmers have been left outside China's prosperity and modernisation.

The right to contract farmland is also frequently infringed or even ignored by local officials. One such case is what happened to Zhao Yurong in Fuyang, Anhui. Zhao signed a contract with the Villagers' Committee (VC) in 1994 to operate 1.721 *mu* of land for a term of 30 years. Zhao's husband was employed by the Huaibei Coal Bureau and had urban residency right in Fuyang. In early 1992 he had been granted the right to transfer his family's urban residency as a bonus for having worked over 10 years. At this point, Zhao and her children paid a fee of 500 *yuan* each as a levy to ease the strain on urban facilities. Under local regulations, people who paid a levy for urban residency were still permitted to contract farmland in their native village on the condition that they continued to live in the village despite their urban residency rights.<sup>20</sup>

However, the VC Party Secretary claimed that Zhao had deceived them when she signed the contract and declared the contract void. In 1995, the village cadres stopped Zhao from collecting the harvest on the grounds that she had changed her residence registration. Zhao was forced to return the contract to the VC and the wheat on her land was confiscated. In the summer of the following year, Zhao was prevented from gathering the harvest by a VC document which declared that any attempt to do so would be treated as theft of collective property. When her 74 year-old father-in-law tried to gather the harvest, he was detained for four days and nights before breaking a window and escaping.

Zhao sued the VC in August 1996. The court ruled that her contract was valid and that the VC should compensate Zhao for two years' yield of wheat. The VC appealed, and Zhao lost her case on appeal. Later, she petitioned against the appeal decision with the local procuratorate which had the power to contest court decisions. The local procuratorate accepted her petition in 1999, and filed a case against the appeal decision in December 2000. The final trial affirmed the court's decision at the first trial. However, the compensation for Zhao fixed at the first trial was only 3304.95 *yuan*, which covered her losses in 1995 and 1996, and did not cover her economic losses between 1996 and 2000.

Behind such apparently arbitrary practices, there are tremendous economic interests propelling local authorities to expropriate land. These interests include increase in revenue, administrative funds and profits for group officials. During this process, farmers who rely on the land for a living turn out to be least compensated. Sometimes, officials even breach other public interests, such as environmental protection, national laws, and superior regulations. A

---

<sup>20</sup> Zhang Yan and Liu Peijun, "Nongfu qi nian susong" [A female farmer's seven-year litigation], *Fazhi ribao*, 5 November 2002, p. 5.

comparison of the distribution of income from land development illustrates the exploitative nature of land expropriation.<sup>21</sup>

Land expropriation is a matter of unilateral action by government agencies. It ignores farmers' interests and is an unequal transference of land property rights. The unclear definition of farmers' land rights results in their interests being widely infringed. The public interest is the major ground for expropriation of land. However, since the scope of the public interest is broad and vague, most such actions are taken more for particular interests than for the public interest. Many different kinds of projects take rural land while the compensation is not paid in accordance with the law and the market. The distribution of compensation is also unfair and lacks transparency.<sup>22</sup> Both officials in the state land department and scholars criticise flaws in land expropriation with respect to compensation, in that standards are decided in the planned economy, rather than in the market. Because of differences in price and yield, it is in practice difficult to standardise average output.

The government plays an active role in reassigning land property rights. According to law, the village collective has the right to use and supervise the use of land, but it has no right to transfer land for compensatory use. The state, on the other hand, may, in accordance with the law, expropriate land which is under collective ownership if this is in the public interest.<sup>23</sup> In this assignment of property rights, land development proceeds in two steps: land expropriation by the government from villages, and the transfer of users' rights priced according to their market value. Land expropriation, in a sense, is a procedure by which all rights formerly held by the village collective are relinquished to the local government.<sup>24</sup>

The insecurity in the land contract system will prove harmful to China's economic growth. It suggests that the Chinese government is not committed to guaranteeing property rights as a precondition for development, but regards the structure of property rights as the natural outcome of social evolution resulting from the economic reforms. In this respect, privatisation in state and collective ownership cannot be brought about through institutional efforts but only gradually guided under the proper socio-economic and legal conditions.<sup>25</sup>

---

<sup>21</sup> Xiaoliu Guo, p. 439.

<sup>22</sup> "Zhengdi zhidu fei gai bu ke le" [The system of land expropriation must be reformed at once], Department of Propaganda of the CCP Central Committee via *Xinhua* News Agency: *Ban yue tan*, no. 18 (2002), pp. 39-41.

<sup>23</sup> Art. 2 of 1999 land law.

<sup>24</sup> Xiaoliu Guo, pp. 424-445.

<sup>25</sup> Peter Ho, p. 398.

## 2. Infringing on enterprises' property rights

In order to foster a market economy based on property rights and a modern enterprise system, the government has many functions to perform in managing and guiding the economy, but these functions must be legalised and the administration must be transparent, open, and fair. The government must not over-regulate, manipulate, or intervene arbitrarily in the economy.<sup>26</sup> However, on the grounds of "regulating the market" and "macro control", the Chinese government regularly intervenes in the economy without aware of the interests of private sector so widespread that it is undermining market development.

For example, governmental agencies have the power to approve or issue business licences, and to confirm professional qualifications and industrial standards. They also have the power to impose fines, cancel registration of enterprises, hold properties and even detain people. They control prices in important industries and hamper free competition in the market. They also interfere in the judicial process in their jurisdictions. The expanding of administrative power is common in modern societies, the problem is how to exercise these wide discretion by following legal rules without abuse of this power.

A competitive market requires the government to be an impartial rule enforcer. At the same time, China's reform model emphasises an authoritarian government to enforce universal reform measures. Thus, there is a conflict between the requirement for a limited government in a market economy and for a powerful government in reform. Since governmental agencies at different levels have complicated connections with overlapping interests, it is difficult for them to remain neutral in making and enforcing rules. A higher-level agency may show a favourable bias towards its subject agencies and enterprises. Sometimes the regulating agency itself may be a market actor.

Thus, it is common for governmental agencies to encroach on private property rights. Local and departmental protectionism has become a major element for undermining market integration and property rights. The arbitrary exercise or abuse of power mainly happens in procedures involving administrative licensing or enforcing penalties. Almost every aspect of business operations needs to be approved by administrative agencies.

For example, in preparation for China's entry into the WTO, a rectification of administrative measures was carried out in some regions. It was found that thousands of items in each region for which administrative approval could be dispensed with: 2027 in Shanghai, 1106 in Chongqing, and 2308 in Zhengzhou. Although government agencies at all

---

<sup>26</sup> Qian Yinyi, "Market Economy and the Rule of Law", *Perspectives*, 1:5 (10 May 2000) ([http://www.oycf.org/Perspectives/5\\_043000/modern\\_market\\_economy\\_and\\_the\\_ru.htm](http://www.oycf.org/Perspectives/5_043000/modern_market_economy_and_the_ru.htm)).



levels reduced the number of items requiring approval by up to 50%, systematic reform is unlikely to take place without specific legal restrictions on these agencies.<sup>27</sup>

Yang Jinyu, the head of the legal affairs office of the State Council, has identified five problems connected with administrative approvals. (1) Too many agencies that have no authority for approvals, such as village or county governments, and internal branches of administrative agencies, are exercising such power in practice. (2) The scope for approval is too broad, and the stipulations for approval are vague and dispersed. The practical administration emphasises checks and approval while less stress is given to service and protection. (3) The process for obtaining administrative approval is time-consuming, involving complicated and obscure internal procedures. (4) Even when approval is obtained, there is no guarantee of an orderly market and fair competition because of lack of effective supervision. (5) Some administrative agencies use the power of approval as a means of pursuing profits, so that administrative approval has become a major source of corruption.<sup>28</sup> For example, officials may pursue private interests through approving loans or quotas; they may take bribes for conferring project contracts, land leases and tax privileges; they make deals in approving rural residents' transfer to urban residency, issuing visas for permanent residency in Hong Kong or Macao, or through allocation of tight resources; they may also pursue profits through approving cadre recruitment, transfer and promotion, and even sell official posts.<sup>29</sup>

Governmental departments often come into conflict with each other for fighting to exercise an administrative approval. In Jinan, Shandong, there have been over 70 incidents involving jurisdictional conflicts between different agencies, causing problems in local construction. For example, the Jinan technical supervision bureau for quality control and the Department of Construction Administration both exercised their power to check and test construction equipment at the same time, leading to the same equipment being double-checked and charged. The technical supervision bureau claimed that the construction department's action was illegal and imposed a penalty against them. As a result, the construction work had to be suspended for 18 months before the relevant authority intervened.<sup>30</sup>

---

<sup>27</sup> Zha Qingjiu, "Ru shi yu Zhongguo de xingzheng fazhi" [The entry of the WTO and China's administrative legal system], *People's Daily*, 13 December 2001, (<http://www.peopledaily.com.cn>).

<sup>28</sup> NPC news website, 26 August 2002 ([www.npcnews.com.cn](http://www.npcnews.com.cn)).

<sup>29</sup> Ibid.

<sup>30</sup> Du Gangjian, "E'zhi xingzheng xuke de fanlan" [To curb rampant administrative approval], *Zhongguo jingji shibao*, 21 September 2002 ([www.cet.com.cn/200209211.htm](http://www.cet.com.cn/200209211.htm)).

Powers of licensing and enforcing penalties have serious consequences for people's personal freedom and property rights.<sup>31</sup> This power is expanding through lack of effective supervision from constitutional and judicial sources. Although administrative hearings have been introduced in the price-fixing sector, in practice, a hearing may not be more than a formality, in that the legal procedures for the hearing may not be observed.

For example, a hearing held in 2002 about the price of Beijing subway fares was closed to the media, and the whole process became an internal matter. The subway company told the journalists that the Price Bureau would decide the fare but the final decision on fares and attendance at the hearing was up to the Propaganda Department. However, the Propaganda officials told the journalists that it was an internal hearing, for the purpose of gathering evidence from transport experts, the Price Bureau, the subway company and other agencies to draft a proposal on price before going public; and that opening the hearing to the media would hamper decision-making.<sup>32</sup>

Professor Ying Songnian, the president of the State Administrative College, pointed out that a hearing was not a decision-making process and that its main purpose was to explain the basis on which fares would be decided. He claimed that a genuine hearing should be conducted in public, where all parties should have a chance to make statements representing their particular interests.<sup>33</sup>

Arbitrary and growing administrative interference has seriously undermined the growth of all kinds of market forces. Enterprises' autonomy and property rights are frequently infringed in practice. For example, in May 1998, the Lingyi Chemical Company signed a lease with the Lingyi county economic commission to operate a cement factory. The term of the lease was five years. But when the factory started to make profits, some officials in the county government colluded to find fault with it, tore up the lease and closed it down in order to take it over themselves.<sup>34</sup>

In other cases, some local governments deliberately sacrificed private investors' interests by taking advantage of enterprise ownership reform to help state-owned enterprises escape tremendous debts. For example, the Liangzhong government in Sichuan transferred 3 million *yuan* of debts incurred by a local state-owned pharmaceutical factory to a private company in 1997. Then by virtue of its administrative power, the Liangzhong government

---

<sup>31</sup> Ma Huide, "Guifan xingzheng xingwei: fangzhi fubai de biyouzhilu" [It is the only way to prevent corruption by regulating administrative actions], *Jiancha ribao*, 13 September 2000 (<http://www.icrb.com.cn/ournews/asp/readnews.asp?id=3411>).

<sup>32</sup> Tong Fuyong, "Jiage tingzheng hui liuyu xingshi?" [Is the price hearing turning out to be a formality?], *Zhongguo jingji shibao*, 2 September 2002, p. 3.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Fazhi ribao*, 30 November 2002, p. 1.

dissolved the private company, claiming that it was unable to repay its debts, and forced it into liquidation.

In this case, the private company went to court in May 1998, claiming that the local government infringed its right of autonomous operation. The court was reluctant to accept the case and soon rejected it on the grounds that the government had the jurisdiction over matters concerning local SOE assets, creditors' rights and debts during the reform of enterprise ownership. When the company appealed to the Nancong intermediate level court, its general manager was detained on the charge of driving an unregistered vehicle by the local PSB for over one year before he was released on bail. The manager then found that his company had been ordered to dissolve in spite of there being no legal basis under company law.<sup>35</sup>

Firms engaged in foreign direct investment (FDI) have repeatedly complained about the poor legal environment for doing business in China. FDI has penetrated every corner of the Chinese market since the open-door policy was introduced, from joint ventures, technology transfers, export manufacturing and public securities to construction, real estate, heavy industry, finance and telecommunications. However, to the foreign investor, Chinese laws are vaguely drafted, misapplied, and arbitrarily enforced. China's administrative legal system, in particular, seems incoherent and even contradictory with respect to encouraging foreign investment.<sup>36</sup>

A suggestion made by the Hong Kong Trade and Development Council (TDC) in 2000 may explain the concern of foreign investors. The TDC suggested that the central government should maintain a higher level of stability and transparency in policies and regulations, simplify judicial and arbitration procedures, contain the interference of administrative departments in the judicial system, increase the legal awareness of officials at all levels, and prevent corruption. In relation to administration, the TDC hope that the government will reduce formalities in the examination, approval and registration of investing projects, unify different local practices, gradually set up a commercial administration system in line with international standards, enhance administrative efficiency, and improve the quality of investment "software".<sup>37</sup>

---

<sup>35</sup> "Ruci gaizhi, hai ren bu qian" [A great damage results from such a reform of the ownership], *Fazhi ribao*, 30 December 2000, p. 5.

<sup>36</sup> Peter Howard Corne, *Foreign Investment in China: The Administrative Legal System* (New York: Trans-national Publishers, 1997). Book review by Robb M Lakritz ([www.law.emoy.edu/EILR/volumes/spg97/LAKAR.html](http://www.law.emoy.edu/EILR/volumes/spg97/LAKAR.html)).

<sup>37</sup> The Hong Kong Trade Development Council, 22 May 2000 (<http://www.tdctrade.com/tdcnews/0005/00052201.htm>).

Although the Administrative Litigation Law (the ALL) permits economic actors, including foreign investors, to challenge the legality of governmental decisions, the limits in this law deter the affected parties from seeking legal protection.<sup>38</sup> Moreover, administrative laws tend to strengthen governmental power. For instance, the requirements for the formation and operation of foreign enterprises reflect the control of the state. The state controls the approval and supervision of foreign investment projects, foreign exchange and taxation through an investment incentive system and tax preferences. For this benefit, FDI enterprises must submit documentation indicating income and tax due before the incentive adjustments are made. Also, in "export oriented" or "advanced technology" status, these enterprises must establish export figures and the conditions of technology use. The state seeks to strengthen its capacity to obtain information on the financial conditions, sale activities, and technology base of foreign investment projects.<sup>39</sup>

Another case shows how a joint venture is affected by China's uncertain administrative law enforcement and local protectionism.<sup>40</sup> In 1996, a district Industrial and Commercial Administrative Bureau (ICAB) in Shanghai decided to re-structure a bonded zone within its jurisdiction. During this action, the bureau ordered a Sino-foreign joint venture to move out of the zone, to re-purchase a site in the zone and to register again with the bureau. When the company did not accept the order, its operational licence was confiscated and its annual industrial check was suspended. In August 1998, the bureau revoked its license claiming that the company failed to accept the annual check. The company was unaware of this sanction until 2001 when it became involved in a civil action and found that it was unqualified as a litigant.

The company then filed an administrative lawsuit at the district court. The court found against it, an appeal followed, and the appeal was also rejected. In this case, the defendant (the bureau) illegally withdrew an operational licence from a joint venture company. According to the relevant laws in regard to the registration of a foreign enterprise, the state Industrial and commercial Administrative Bureau (ICAB) is the management agency, and the local bureau only has the authority to register it and not the power to impose any sanction such as revoking a licence.<sup>41</sup> In other words, the local bureau cannot impose such a penalty unless it has been empowered to do so.

---

<sup>38</sup> Pitman B. Potter, "Foreign Investment Law in the PRC: Dilemmas of State Control", in Stanley Lubman (ed.), *China's Legal Reforms* (New York: Oxford University Press, 1996), pp. 155-185.

<sup>39</sup> Potter, *ibid*, p. 173.

<sup>40</sup> Hou Jie, "Women li 'yi fa xingzheng' haiyou duo yuan?" [How far are we from 'administration in accordance with law'?), *Guo fa wang*, 29 August 2002 ([www.law.com.cn/pg/newsshow.php?id=2265](http://www.law.com.cn/pg/newsshow.php?id=2265)).

<sup>41</sup> Article 64 of "Qiyе faren dengji guanli shishi xize" [The particulars concerning the management and registration of legal persons in the form of enterprises] and article 1 of the ICAB "Guanyu jinyibu



The defendant also failed to provide a public hearing for such a serious case. The administrative penalty law and the Shanghai municipal hearing procedure stipulate that a hearing must be held according to legal procedures before a serious penalty is imposed. The local bureau failed to send a hearing notification to the company. The only notification was issued by its superior, the Shanghai municipal bureau. It was published in a local newspaper and displayed in the municipal bureau courtyard, addressed to all enterprises that had not accepted annual checks for its operation and financial status, and not specifically issued to this company.

Thus the bureau exceeded its authority and failed to observe legal procedures in revoking the company's licence. The courts in both instances ignored this fact and upheld the bureau's decision. Over three thousands enterprises were affected by such sanctions on the day that the notice was issued. To maintain social stability in line with Party concern, the courts tend to protect the reputation of administrative agencies at the expense of the legal rights of enterprises.

In most circumstances, local protectionism plays an important role in breaching property rights. The next case illustrates collusion between officialdom (including the judiciary) and local businessmen in infringing the interests of a foreign enterprise. In 1992 and 1993, the Hong Kong Lihua Investment Ltd. and the Zhuzhou Tailian Housing Developing Ltd. signed an agreement to establish two joint ventures, the Taihua Housing Development Ltd. and the Tianli Interior Decoration Company.

Liu Guanghui managed the new joint venture, Tianli, for the Chinese side. He controlled all information in relation to Tianli's operation, including its financial documents. He refused to follow decisions made by the Board of Directors, and failed to allocate any profits to Lihua (the Hong Kong side). At the same time, he embezzled Tianli's money, seriously undermining the new venture and Lihua's rights and interests.

After efforts to resolve this problem through consultation failed, Lihua filed an application for arbitration to China's International Economic and Trade Arbitration Commission (CIETAC) in 1997, together with an application to seal Tianli's books. However, Liu colluded with the judge, Li Guobing, who was in charge of the evidence, to move the evidence out of Li's office. Then Liu instructed over ten accountants, including some from the local accountancy agency, and some tax officials to alter books to destroy the evidence.

---

mingque waishang touzhi qiye dengji guanli gongzuo zhize youguan wenti de tongzhi" [The notice on relevant problems concerning a further confirmation of managing the registration work of foreign enterprises]. See *Zhongguo faxue hui* website (<http://www.lawchina.com.cn/english/fagui/fal.htm>).

At the same time, Liu called upon local hooligans to take over another company solely owned by Lihua in Zhuzhou. The company was forced to stop operation and all personnel and staff were threatened with dismissal. None of the relevant authorities (the local government, Party committee, departments in charge of foreign investment and judicial departments) provided protection for the foreign investor's interests. On the contrary, the municipal government issued a document in which the incident was attributed to a long-standing conflict between the two sides. The document did not condemn Liu, whose next move was to take over another joint venture, Taihua. As his hooligans moved, over one hundred policemen and some governmental officials stood by without attempting to intervene. In 2001, Liu began to sell residences developed by Taihua at a cheap price.

In spite of Lihua's repeated appeals to the Zhuzhou authority since July 2001, there has been no response from the official side. The situation in Taihua remained unchanged. As early as 2000, an audit of Tianli provided clear evidence of Liu's fraud, showing that at least 11,814,082 *yuan* had been embezzled, and that taxes of 2,311,991.74 *yuan* had been evaded. In spite of all this, the local authority insisted that the case was an internal conflict concerning operational affairs of the joint venture.

The complicity of the local authorities made Liu more and more arrogant. He claimed that nobody in Zhuzhou, neither the mayor nor the Communist Party, could handle him and that he was a villain and could shut out the heavens with one hand. In September 2001, the vice-mayor of Zhuzhou even ordered Taihua to dissolve, on the grounds that the Chinese side of the joint venture had made such an application.

This is a serious case of infringing foreign investors' interests. The local Party Committee, the government, and the court exerted their power to interfere in the local economy. The court, which is subject to local administrative power, had no authority to resolve the dispute. On the contrary, it directly participated in the illegal act.<sup>42</sup> This also revealed serious abuse of power within the local officialdom.

In comparison to all other types of enterprises, private enterprises find it difficult to survive. The next case shows that even in governmental purchases, where the government acts as an ordinary buyer under civil law, the decision-making process is arbitrary and lacks transparency. Governmental purchases are poorly regulated and the government always dominates, resulting in breaches of contracts and causing great loss to other tenders.

The Jinghua Yidi Medical Equipment Company in Zhejiang is a private enterprise. In July 2000, it decided to take part in a tender competition for medical equipment launched by the

---

<sup>42</sup> *Lihua zai xian*, 18 September 2002 (<http://www.lihuaonline.com/ajrr/dxal.htm>).

Agricultural Ministry, publicised in the *Economic Daily* and the *China Tender News*.<sup>43</sup> The company considered that the competition would be fair since the sponsor was a state ministry. Since it had a long history and a good reputation for its goods, the company was full of confidence that it would win the contract on the item for which it was bidding.

After spending 3,800 *yuan* for a one-page tender document and 30,000 *yuan* for the guarantees, the company formally entered its bid. At the tender meeting, the officials in charge stressed that the tender would be conducted according to law. After going through all procedures, the company became the top contender for its low price and good quality. In January 2001, Ministry experts and officials inspected the factory and gave it their approval. In February, however, the company was instructed to send three sets of sample equipment for further inspection. In May the inspection report stated that one of three samples did not comply with the bid standard.

The company did not believe the report because it had made repeated inspections and tests before sending these samples to Beijing. Moreover, there were some irregular points in the inspection report: it was not signed or dated, and the standards and facilities were not specified. The report did not comply with the state's requirements for the inspection of product quality. The company requested a second check but was refused because the terms of the tender had been changed. The company received no compensation for its loss. Thus a governmental agency arbitrarily changed the tender irrespective of the interests of other parties involved. It turned out that the Ministry had already signed a contract with another company.

According to the regulations on tender, the assessment committee should comprise an odd number of experts, and each expert should have over 8 years of professional experience. In this case, however, there were 24 experts on the committee, and the report did not list their qualifications. Moreover, there were only two bidders for this particular item, and according to regulations, the process was invalid and a new round of tender was necessary since there were only two companies making bids, it was illegal for either to be awarded the contract. However, the Ministry signed a contract with the other party. Here, the Ministry performed a double role as buyer and assessor at the same time. The effective period of a tender is within 120 days from the date of opening, but the result of the tender was only made public a full year later.

---

<sup>43</sup> "Shui lai jiandu 'yangguang caigou': quanguo shouli zhengfu caigou an zhuizong" [Who will supervise the "(government) purchase under the sun": An investigation of the first case in China concerning governmental purchase], *Xinhua wang* (Hangzhou), 13 June 2002 (<http://news.xinhuanet.com>).

Governmental purchase programs are required to be transparent. But illegal practices including undue and unfair procedures, high charges, arbitrary interference, and even fraud and corruption overshadow government purchasing. Frequently the winner for the tender is not the best-qualified party. In this case, the winner turns out to be a company that had no such product, no registration for medical equipment, and no licence for this product.

In connection with the separation between land ownership and users' rights in rural areas, the government started with SOEs' ownership and operation rights. The property rights of enterprises are divided into three kinds: rights of operation [*jingying quan*, 经营权], rights of contract [*chengbao quan*, 承包权] and rights of lease [*zulin quan*, 租赁权]. The term operational right was used in order to comply with the socialist ownership system. In this way, the SOEs may only have the rights to use and manage the enterprises without rights of market transaction of their property rights. The ownership [*suoyouquan*, 所有权] here is equivalent to the term "property rights" in the West, but China deliberately leaves the two concepts vague in order to maintain its socialist ideology.

However, Chinese scholars suggested that the term "legal person's property right" [*faren caichan suoyouquan*, 法人财产权], in distinction to state ownership, should be used in order to acknowledge the SOEs' property rights. In this way, the SOEs may not only have operational and management rights but also have the rights to make transactions of their property in the market. At the same time, SOEs remains state assets and the ownership rights belongs to the state while the enterprises become a legally established entity, a legal person, to go to the market on the behalf of the state. The law used the concept of a "representative" scheme to separate property rights and ownership. In this way, the state became an investor and shareholder by entrusting property rights to enterprises, while the latter became the agent for state property and obtained a legal person's property rights. The SOEs were thus entitled to autonomous operation and to the pursuit of profits without enjoying ownership.

This transformation of SOEs' rights from operational rights to legal person's property rights has touched an important socialist principle in which public ownership is inviolable and may not be infringed. However, there must be legal guarantees to safeguard enterprises' property rights against claims from a third party in order for the property rights to enter into the market and also to be enforced through judicial procedures. This requires that private property rights be established through revising the constitution. Yet, this will endanger the current ideology and political goals.

Foreign direct investment (FDI) is greatly encouraged by the Chinese government. Laws and regulations promoting FDI are many. Non-public enterprises have also been



regarded as an important supplement in the socialist economy. The 1999 revised constitution even elevated individual and private businesses to a position of "important actors in the market economy and major representatives of China's non-public ownership." It declares that the state will protect the lawful rights and interests of this category.

However, the revision of the constitution did not accept the scholars' suggestion that the state refrain from intervention in private enterprises. Instead, the constitution repeatedly stresses that the state must administer and supervise the non-public economy. It did not define a private economy or adopt the expression "protecting private property rights". The revision ended up as a compromise among different power groups, and even went backward in some areas. The amendment of the constitution leaves the problem of property rights unresolved. As in land reform, this vagueness was deliberate and institutional in order to maintain both the dominant ideology in ownership and flexibility during the economic reforms.

The unclear definition of property rights and the private economy provides consistent flexibility for administrative intervention in the enterprises' operation and for infringing their property rights. Without institutional safeguards for property rights, no matter how the state endeavours to regulate and guide them, it is hard for private property to flourish. At the same time, if the non-public economy in practice proves to be more efficient and competitive, the problem of whether the dominant position of public ownership still needs to be maintained will confront the authorities. If the answer is yes, the market economy will suffer; if the answer is no, the socialist system will be undermined.

The main task of China's economic reform is to introduce a market mechanism based on mutual agreements and performance of contracts. But this mutual acknowledgement does not automatically make the property rights secure, rather, their safety and expansion depend on state protection. The unresolved problems of definition and content of property rights in the constitution create disorder and abuses in administrative and judicial practices, undermining the emerging market economy.

Once the state legalises property rights, its arbitrary intervention over all kinds of enterprises would be restricted. In China, this problem is very complicated since it relates directly to the sensitive topics of the current political system and ideology. The incompatibility between the changing socio-economic structure and the Leninist style state is becoming more and more apparent.

There is one other difficult task facing the state potential conflicts between social justice and private property rights. It is unclear whether the rule of law will safeguard fair play during the allocation of profits. On the one hand, from a formal point of view, if the law

fails to provide protection for private property, the latter would be subject to administrative power and become political capital. However, since political capital amounts to corruption, it would be improper for the law to protect such property.

On the other hand, from a substantive point of view, since the rule of law requires state power to be neutral in the market economy, a limited government and an autonomous society are necessary, with governmental functions being limited during re-allocation of social profits. However, since a great gap between the rich and poor has emerged in the new Chinese market, it is important for the government to decrease this gap through social welfare. Once the state steps into this process, it will be difficult for the government to maintain neutrality.<sup>44</sup>

Without effective control, government intervention will create abuses of administrative power. Thus it is necessary to rely on administrative laws and judicial review to restrict state authorities. The judicial review over administrative actions and regulations should be strengthened. Since interest groups in China are still relatively few in number, the judicial review is especially important in keeping the government neutral and impartial. In this area, judicial review will go a long way in reducing the current legal chaos and improving the status of the judiciary.

### **3. Administrative monopoly and control**

In addition to frequent interference in the economy and infringement of property rights, the government directly manipulates important industries such as transport, telecommunication and the share market, not allowing free competition. Administrative monopoly refers to the practice in which government agencies or SOEs, by taking advantage of their public powers, deliberately limit or exclude private capital's participation in certain industries that are solely controlled by the administrative authorities. Monopoly directly results from governmental interference in the economy and the increasing expansion of administrative power. Since powerful government agencies become market players in competition with other market actors, the development of a free market and property rights are seriously hampered.

In contemporary China, there is not an anti-monopoly law or any independent institute to regulate state monopoly. In other developed societies, competition is considered a cornerstone for developing modern enterprises and a precondition for market operation.<sup>45</sup> To

---

<sup>44</sup> In 2004, the PRC revised its constitution and added the article of "the state respect for and protect private property rights", which is a great progress. But the effect from it remains to be seen in practice since all problems relating to the property rights are not changed.

<sup>45</sup> Ying Qiaohong, "Qianxi woguo fannongduan lifa zhong de jige wenti" [A brief discussion of several problems of anti-monopoly legislations in our country], *Jiancha ribao* website: Zhengyi wang, 4 March 2002 (<http://www.jcrb.com.cn/zyw>).

date, the only relevant stipulation is found in the PRC Law against Improper Competition, promulgated in 1993. Article 7 in this law only roughly provides that the government and its departments may not abuse power to force transactions, prevent outside products from entering into the local market or local products going out of the local market. Article 30 stipulates the legal responsibility for breach of this stipulation, which only requires the relevant agencies to correct their misconduct (or bear administrative sanctions in case of serious circumstances) rather than by law. It is obvious that this law cannot limit administrative monopoly.

Efficiency in monopolised industries is so low that they find it hard to meet the demand in the market. Like telecommunication and public transport, the share market, for instance, has been a state monopoly since its inception. Fraud, corruption and other illegal transactions are rampant in the share market, seriously undermining its function, and at the same time, shareholders' interests, especially small shareholders, have no legal guarantee. For example, in June 1998, the Southern Security Exchange Centre in Guangdong was suddenly instructed to stop transactions of all circulating shares because of its "illegal transactions outside the exchange centre".<sup>46</sup> The minority shareholders (1 billion individual shares) received no remedy from the interruption since they could not sell their shares. Moreover, the court refused to accept their request for compensation because of a notice from the SPC, which ordered the courts to suspend any economic disputes arising from illegal share transactions outside the exchange centre or enforcing any decisions if such cases had been tried. The Chinese Security Supervision Commission, as the direct administrator of the share market, failed to adopt any measures for protecting individual shareholders' interests while the institutional shareholders simply absolved their losses in their operating costs.

Telecommunication is another area of administrative monopoly. Private operation in this sector is strictly prohibited. For example, in December 1997, the Fuzhou Telecommunication Bureau accused Chen Yan of illegally running an internet telephone bar on the ground that it should be exclusively operated by state Post and Telecommunication departments.<sup>47</sup> The PSB accepted this case on the basis that Chen had breached the criminal law under article 225 (crime of illegal operation). The police interrogated Chen and confiscated his telephone, computer as well as 50,000 *yuan* they found at the site as illegal income.

---

<sup>46</sup> *Xingzhengfa luntan*, 11 October 2002 ([www.1488.com.cn/bbs/showannounce.asp?id](http://www.1488.com.cn/bbs/showannounce.asp?id))

<sup>47</sup> Zhou Qiren, *Xingzhengfa luntan*, 18 September 2002 ([www.1488.com.cn/bbs/showannounce.asp?id](http://www.1488.com.cn/bbs/showannounce.asp?id)).

Chen Yan sued the police but the court identified the police action in this case to be a criminal investigation (a judicial action, which is not within the jurisdiction of administrative litigation) under the CPL and not an administrative action, and therefore it rejected Chen's lawsuit. He then appealed. The appellate court decided in January 1999 that Chen had not broken the law and that the PSB was wrong. The court ruled that the PSB had infringed Chen's personal freedom and property interests, and that Chen was entitled to bring administrative litigation. The original court was ordered to retry the case but it made the same decision again. The PSB did not in the end return the confiscated property to Chen.

Technically, the use of internet phone (IP) is different from the telephone services in that IP does not need a telephone line and the cost comprises the local rate, internet service charges and recipients' payment. According to a Notice issued by the State Council in 1993, IP was defined as a "computer information service" and a "public multi-media telecommunication service" open to the public. It is distinct from another Notice issued in 1990, which stipulated that only state postal departments were entitled to long-distance and international telephone business.

However, soon after this case, the Ministry of Information Industry issued a notice to control IP service to the public by requiring its approval. Such restriction hampered the development of advanced technology by restricting it from entering the market. By doing this, the government gained huge profits. It was reported that in April 1999, only six months after introducing IP service, three major state-owned telecommunication companies earned each month an average of 0.1 billion *yuan* from this single business. It is estimated that to 2002 the national income from this service would amount to 100 billion, almost half of the whole telephone market.<sup>48</sup> However, such great profit is at the expense of social progress and growth in the private economy. Long-term economic growth and rule of law have been compromised for the sake of short-term economic interests.

The case of the urban taxi monopoly in Beijing is especially complex.<sup>49</sup> Up to 1985, the taxi industry was solely operated by the municipal transport bureau. There were few companies and a limited number of vehicles. The regulations were relaxed in 1985, allowing some state-owned and collective-owned taxi companies to be established. The industry expanded over the next few years to include 259 companies and around 10,000 taxis. As the pace of economic reform increased after 1992, the Beijing municipal government declared

---

<sup>48</sup> *ibid.*

<sup>49</sup> The case is carefully sieved and filtered from following sources: Wang Keqin, "Beijing chuzuche nongdun heimū" [The inside story of taxi monopoly in Beijing], *Zhongguo jingji shibao*, 6 December 2002, pp. 1-5; Wang Jun, "Zhengfu guanzhi de jingji he falü wenti: Beijing shi chuzu hangye ge'an fenxi" [The economic and legal problems of governmental control: analysis of an individual case in Beijing's taxi industry], *Zhongguo gonggong guanli*, 22 September 2002 [Electronic journal, no. 117].



an ambitious goal: there must be five taxis available whenever a customer waves a hand. In 1994, there were 1,400 companies and 60,000 taxis. Each driver invested a sum of money [*chuzi kuan*, 出资款] towards the cost of the vehicle (amounting to almost half the purchase price) and thus enjoyed relative freedom of operation after paying a management fee to the company. However, due to poor regulation, this expansion turned into chaos as even primary schools and kindergartens became involved in the taxi business.

In order to control the situation, the transport bureau started to re-structure the taxi market in 1996 by preventing taxi companies from selling vehicles to drivers. All taxi cars had to be returned to the companies irrespective of the fact that the drivers had invested a large sum of money in the vehicle when they signed the contract. Thus, the restructuring turned over the drivers' investments to the companies. At the same time, the driver became subject to the whim of the company, since the previous co-operation changed into employer-employee relationship. The company did not refund drivers the money they had invested. Instead, they turned this money into risk guarantees [*fengxian baozheng jin*, 风险保证金], in effect, confiscating the individual driver's property.

Drivers were also required to pay about five thousand *yuan* each month as a monthly rent [*yuefen qian*, 月份钱]. Many taxi companies became prosperous. In 2000, the municipal government encouraged businesses to expand by merger or acquisition, and small companies that had fewer than 200 taxis were urged to incorporate with big companies. Through the process of incorporation, the number of taxi companies was reduced from 1,000 to 200. Twelve major brands emerged at the end of this process. At present, there are a total of 67,000 taxi vehicles in Beijing. Only 1,000 of these are operated by individual drivers who enjoy autonomy and only pay a management fee. The other taxis are driven by company drivers who sign contracts with the taxi company.<sup>50</sup> Company drivers are requested to submit risk guarantees, which are equal to half of the car price, plus a monthly rent to the company.

Throughout this process, the taxi drivers became the biggest victims while the companies became the biggest beneficiaries. Mostly farmers and redundant workers from the SOEs, the drivers contributed almost their whole savings to purchase vehicles, only to find them become the companies' property. Although now they became employees of the company, they had to pay a monthly rent on the vehicles and were denied their legal benefits such as pensions, redundancy payments, insurance and medical treatment. They also had to pay their own maintenance, transport fines and other costs.

---

<sup>50</sup> Wang Jun, *ibid.*

Drivers were particularly disadvantaged by the so-called risk guarantees, i.e. the sum of money roughly equivalent to the price they had invested in the taxis, were held by the company against the risk of damage or other loss to the vehicle. When a driver left the company, however, this sum was often withheld in part or wholly by the company. The companies often sought pretexts for deducing sums against the risk guarantees, and some companies even used fines to resolve their own financial crises. For example, in 2000 Wang Xueyang was fined by the traffic police 1,000 *yuan* and given a two-month suspension from driving for a breach of traffic regulations. His company used this pretext to fire him and also confiscated 35,000 *yuan* from his risk deposit.

The law requires companies to make provision for pensions and insurance for their employees, but taxi companies failed to do so. One reason is that rural workers are not included in the urban benefits system in China. Another reason is the financial cost of insurance. The annual insurance for a taxi vehicle worth 100,000 *yuan* would be 5,350 *yuan* at national standard rates. In other words, companies would have to pay 67,000 drivers in Beijing a total premium of over 0.3 billion *yuan*. Instead of providing insurance, some companies adopted an internal insurance scheme which further justified the charge of a high monthly rent. However, this internal scheme would not apply to individual drivers in case of accidents or breaches of traffic regulations. On the contrary, the company would fine such drivers.

In these circumstances, taxi drivers became one of the most vulnerable groups of employees, working long hours for little pay and benefits and having to contribute rent and risk guarantees to their employers. When their interests were infringed, there was nowhere for them to seek justice, since the Beijing Supreme Court issued a notice on 7 September 1999 preventing courts from adjudicating disputes between taxi drivers and their companies. Even if the courts were open to them, most drivers could not afford the litigation fees.

Deng Shaolong is a taxi driver. In 2001, he was treated by a hospital for a condition resulting from long-term driving. During the four months of his medical treatment, the company still charged him a monthly rent of 5,100 *yuan*, although he was unable to work and had no income. Deng wanted to return the taxi to the company but was refused. The company warned him that returning the taxi would be a breach of contract and he would have to compensate the company 15,000 *yuan*, to be deducted from his risk guarantee. In order to cover hospital fees and his monthly taxi rent, Deng had to go back to work before he had made a full recovery.

Zheng Zisheng was required by his company to hand over the sum of 115,000 *yuan* in 1995 to buy an old car which was actually worth 50,000 *yuan*. He also paid 1,850 *yuan* in

monthly rent. In 2000, the company sold his car for 70,000 *yuan*. Qiu Yuejin paid 100,000 *yuan* for an old taxi from his company. A year later, he had earned around 10,000 *yuan*. The company then sold the taxi and Qiu was fined, losing some 80,000 *yuan* in the transaction. The same fate also happened to many other drivers in Qiu's company.

Usually taxi companies got rich in two ways. One was to use the drivers' investments to expand. The Sheng Da Li Taxi Company is such an example. This company now has 262 taxis and nearly 30,000,000 *yuan* in assets. According to its general manager, he applied for a certificate to operate taxi service from a village government in a suburb of Beijing in 1992. After the village government stamped the certificate, he then submitted an application to the Beijing Municipal Bureau of Transport for approval to operate passenger transport. At this stage, he was given a quota of 60 taxis. He recruited 25 drivers who each invested 50,000 *yuan* for their vehicles, obtaining a total of over 1,200,000 *yuan*. He himself invested no money whatsoever in building up the company.

The other way was to buy cheap cars on borrowed money and then sell them to drivers at a higher price. Zhang Huiyu bought 46 taxis and sold them to his drivers at a profit. His company became prosperous by 1996. Soon after, he bought back these taxis from the drivers at a price far lower than that the drivers had paid, claiming to upgrade standards in order to charge higher monthly rents. After the restructuring, the monthly rent increased to over 4,000 *yuan*, plus 30,000 to 50,000 *yuan* of risk guarantee. Zhang further expanded his company to 262 taxis through purchasing small businesses, transforming what had been a one-man village enterprise into a joint-stock company. He claimed that all of the taxis belonged to the company and had nothing to do with the drivers any more.

The governmental control over the taxi service in Beijing is an example of problems revealed by governmental supervision. It undermines the interests of the state, the drivers and the public. The tax revenue from the whole number of taxi companies is very low. If the individual drivers of the taxi service now operating nation-wide were allowed to own their own vehicles, of the 780,000 taxis country-wide, there would be an annual increase in tax revenue of over 14 billion *yuan*. In Beijing, the annual tax revenue from owner-driven taxis would amount to 1.2 billion. In addition, the state could obtain a huge amount of money from auctioning taxi licences. The fee for a ten-year license could amount to at least 200,000 *yuan*. In this way, the income on the 66,000 taxis in Beijing would amount to 13 billion every ten years or 1.3 billion a year, equal to 2.9% of Beijing's revenue in 2001.

Drivers' interests have also been seriously infringed by governmental control. According to an investigation,<sup>51</sup> the gross income of a taxi driver is normally 9,000 *yuan* per

---

<sup>51</sup> Wang Jun, *Ibid*.

month. However, after deducting costs (including the monthly rent of around 5,000 *yuan*), the net income is 1,900 *yuan* per month. Without companies to act as the intermediary between the state and the individual drivers, a driver would be able to retain around 6,300 *yuan* per month.

The annual average wage in Beijing in 2001 was 17,300 *yuan* per worker for the requirement of an annual 220 working days at 79 *yuan* per day. At this rate, a taxi driver, who may work up to 585 days a year [since they usually work long hours], should have an annual income of 46,215 *yuan* or 3,851 per month. However, the Beijing Taxi Association found that the average monthly income of taxi drivers in Beijing was only 1818 *yuan*. This highlights the low wages and long hours worked by taxi drivers.

The governmental control over the taxi service also results in high costs to customers. Without taxi companies to act as an intermediary between the state and the individual drivers, competition between drivers would reduce costs to customers.

The current situation also reveals lack of clarity in property rights. According to regulations, the taxi companies are collectively-owned enterprises in which all assets belong to the drivers. Before the restructuring, drivers purchased their vehicles and the taxi companies represented their collective interests as investors. However, they did not enjoy investors' rights, for example, to receive a bonus or to take part in decision-making. In this period, the drivers were in effect employees of the companies. Their position became even weaker as a result of the restructuring process, which deprived them of their property. At the same time, taxi companies became the legal owners of the vehicles and other company property through registration with the government (local ICAB). That is, the owner-managers became the sole shareholders in the company.

According to the Beijing Labour Bureau, an employment involves four elements: a contract, a wage, a job and social security benefits. In this case, although some companies gave contracts to drivers under pressure from the labour authority, most companies did not give contracts to their drivers. The law does not permit enterprises to collect any risk guarantees from their employees. Thus the relationship between the drivers and the companies seems to be more like a labour-capital relationship than an employer-employee one.

Since the taxi service is controlled by the government (the Beijing Transport bureau), disputes resulting from the restructuring process between the companies and drivers are many and complicated. The courts are reluctant to be involved in this type of dispute for fear of causing conflict with governmental policy or risking social disorder. The courts have failed to play a role in resolving social disputes and protecting individual property and



employment rights. The courts in Beijing have accepted 160 such disputes since the restructuring, some of them as group litigation. In order to protect their rights, drivers frequently appealed to the superior authorities and even in some cases held demonstration outside the courts. This situation came to the attention of the Beijing Supreme Court in 1999, which required that all such disputes should be resolved within the companies or their superior management agencies.

The control over the taxi market is in conflict with the market demand for free competition. The only solution is to replace a management agency within a planned economy by a market mechanism. The taxi companies should be dissolved in order to guarantee the autonomous operation of individual drivers. The government should concentrate on assuring quality through regulations concerning admission and fair competition.

This situation also shows that during the transition from a planned to a market economy, conflicts of interest between the state and society will greatly increase. It requires a re-allocation of interests and risks among the government, enterprises and individuals through specifying property rights and providing legal guarantees for their enforcement. At the same time, the government is required to play a role as an independent and reputable rule-enforcer, in order to keep a balance among various interests.

#### **4. Conclusion**

Property rights are not simply a kind of civil right, but rather a constitutional right in the first place.<sup>52</sup> If the constitution does not stipulate property rights to be a basic right, then civil laws which include some stipulations on property rights generally do not offer adequate protection. Property rights has been acknowledged worldwide as basic human rights and a constitutional right, and private property may not be transferred, separated, or taken away by force without the consent of their owner. To define and then safeguard this right will greatly promote the development of a market economy and the rule of law.

The specification and safeguarding of property rights have been proved to be a quite desirable model for smooth functioning of capitalism. The establishment of the concept of property rights is necessary for promoting economic welfare and social efficiency, leading to an increasingly autonomous and strong private sector in social and economic areas. In the long run this trend is likely to form a civil society to provides a balance to the state sector. Recognition of property rights is a preliminary step for the emergence of private interests.

The rule of law is founded on the protection of property rights and on the distinction between public and private interests. Thus it is the state's duty to provide guarantees for property rights.

At the same time, property rights will facilitate market operation. If market actors are not entitled to the ownership of their property, they will not be able to take part in market activities. If the constitution does not provide protection for individual property rights equal to that of state and collective property rights, there will be widespread infringement or ignorance of this right in practice. In a socialist planned state, the means of production are owned by the state, so there is no need for legal protection of state rights against its own infringement. However, in a market economy, it is important to create a balance between the rights of market participants and state intervention through a set of well-defined rules and effective enforcement of these rules.

In contemporary China, laws and regulations in relation to the concept, operation and protection of property rights are full of conflict and confusion, leaving wide spaces for the state sector and governmental agencies to neglect or ignore the interests of enterprises and individuals. The law is particularly vague about the nature of private property rights, resulting in the vulnerability of rapidly growing township-village industrial enterprises in rural areas to intervention and exploitation. With the growth of a new market economy, the formally-marginal non-public sector is producing more than half of China's industrial output. In order to gain more revenues from local enterprises, local governments try to maintain these businesses within the public domain without defining their private nature, although they can be tradable in local markets. There are many signs that China's economy is increasingly becoming reliant on interdependence between the state agencies and the enterprises within their jurisdiction. Governmental officials and their relatives are themselves deeply involved in public and private enterprises, especially at the local level. In this situation, the distinction between public and private property is easily blurred.

Although the CCP has realised the importance of a rational legal system to economic growth, legal reforms are constrained by the pace of economic development. As an instrument of serving the socialist market economy, law in today's China is flexible and pragmatic, but its flexibility can also undermine the autonomy of the market economy. Moreover, when adjudication on unclear property rights is conducted by state institutions, their rulings tend to uphold the system of socialist ownership. Even in FDI investment, although the reformers have looked to Western-style laws to attract foreign capital, the

---

<sup>52</sup> Zhao Shiyi, "Lun caichanquan de xianfa baozhang yu zhiyue" [A discussion of constitutional safeguarding and curbing of the property rights], *Faxue pinglun*, no. 5 (1999), quoted in *Xingzhengfa*

extent to which these Western legal norms can take root in Chinese society is open to question without legal guarantees for FDI property rights.<sup>53</sup> The implementation and enforcement of such norms is at local government's discretion. Social connections have much more importance than predictable legal rules in guiding foreign investment, and the "rule of law" is only a slogan at present in China.

The demand for a legally limited government will become more pressing than before following China's entry into the World Trade Organisation (WTO). The market economy requires that the government exert its power according to the rule of law in order to safeguard the interests of both domestic and international enterprises. The government may neither interfere excessively in the market nor participate directly in market operation. In this area, the regime and its officials remain unprepared for such a transformation from master to servant within a short period. Moreover, the top-down model of reform which emphasises government role increases the potential difficulties in balancing government functions in future.

---

*luntan*, 11 July 2001.

<sup>53</sup> Articles on legal restraints on FDI are many. See, for example, Peter Howard Corne, *Foreign Investment in China: The Administrative Legal System*; Pitman Potter, *Foreign Business Law in China* (London: The 1990 Institute, 1995) and also his article entitled "Foreign Investment Law in the PRC: Dilemmas of State Control" in Stanley Lubman (ed.), *China's Legal Reforms*, pp. 155-185.

## Chapter Five: Judicial Independence: A Long Way to Go

The decline of Party influence and the decentralisation of political power allow the possibility of professional and independent development of the courts. Since the 1990s, reforms of court institutions, recruitment of judges and adjudication procedures have been carried out. The PRC courts have become more active than ever before, with ever-increasing caseload year by year. However, the courts remain weak in protecting individual rights and interests. Their capacity to restrict political and administrative power is especially limited. In contemporary China, civil relations have become more complex than ever before in China's history with the progress of economic reforms. The versatile interests require the courts to play an impartial and efficient role in resolving conflicts, protecting private rights and fulfilling social justice.

In China, the judiciary is no more than an administrative agency and the judges are a part of governmental officialdom. The PRC adopts one Party rule without separation between the administration and judiciary. The courts safeguard state and public interests to which individual interests are always subordinate. As Anthony Dicks notes, this situation "necessarily throws doubt on the authority of the courts as exponents of a generalised and universally applicable view of the law".<sup>1</sup> The judiciary has always been exposed to a wide range of internal and external interference. Within the current power structure, judicial independence is not guaranteed, which makes it difficult for the courts to assure judicial fairness and efficiency.

The courts are required to carry a wide range of tasks in addition to adjudication, including resolving the ever-increasing civil disputes arising from the new market relationship, dealing with the same quick-increasing crimes, curtailing administrative powers and keeping their judgements in line with Party imperatives.<sup>2</sup> Challenges facing the courts include the difficulty in defining court tasks and adjudication style, following legal procedures in trial, enforcing judicial decisions, and protecting human rights including personal and property rights. The biggest obstacle affecting court authority comes from Party and government interference. The courts continue to be regarded as a forum of the Party and state to keep in line with Party policy and propaganda in their daily work. The lack of independence results in poor efficiency in resolving disputes and widespread judicial corruption, not to mention checks or curbs on the state power.

---

<sup>1</sup> Anthony R. Dicks, "Compartmentalisation of Power and Judicial Restraints", *China Quarterly*, no. 141 (March 1995), p. 109.

<sup>2</sup> Qianfan Zhang, "The Peoples' Court in Transition: the Prospects of the Chinese Judicial Reform", *Journal of Contemporary China*, 34:12, (2003), p. 71.



## 1. Judicial independence: a hard goal to gain

A fundamental principle of judicial independence, according to Professor Paul Gewirtz in Yale University, is its “capacity to decide cases in a lawful and impartial manner free from improper control and influence.”<sup>3</sup> Judicial independence is a cornerstone of a society based on the rule of law and a prerequisite for judicial fairness. The public wishes the courts to play their function impartially, including resolving legal disputes, articulating legal norms that people can rely on, protecting legal rights, and constraining illegal governmental actions.<sup>4</sup> Each of these functions, particularly in a market economy, requires judicial institutions being independent from other state powers. Judicial independence not only includes institutional independence of the courts as a whole from external authorities but also from each other within the court system; it also includes the autonomy of individual judges from internal interference within court hierarchy. In other words, judicial independence includes autonomy of both the courts and judges. In this way, the courts can meet a Weberian requirement for a politically neutral arbitrator, and the judges can independently try cases and take responsibility for their decisions.

The PRC constitution has provided, without using the term “judicial independence,” that the courts independently exercise their powers of adjudication and are not subject to any interference from any administrative agencies, social organisations and individuals. The organic law of the courts and the Judges’ Law also assure that the courts independently exercise the power of adjudication and are subject only to the law.<sup>5</sup> However, these stipulations cannot immunise the courts from a variety of influences. Public debate on the rule of law in contemporary China has increased awareness of the need for judicial independence. Nevertheless, an autonomous judiciary is far from established in China.

For a long time, the courts has become an administrative agency under the Party-state structure; localised, as an administrative agency subject to local authority; non-professional, as the courts being a government branch and the judges are public servant; and non-independent.<sup>6</sup> Senior politicians including Deng Xiaoping and Jiang Zemin have repeatedly asserted that the Western idea of a tripartite division of public powers and the

---

<sup>3</sup> Paul Gewirtz, “Independence and Accountability of Courts”, *Global Law Review*, 24:7 (2002), p. 2. Its electronic version can be accessed in *The China Law Centre of Yale Law School* (<http://chinalaw.law.yale.edu/html/publications.htm>).

<sup>4</sup> Ibid.

<sup>5</sup> Article 126 of the constitution; article 4 of the Organic Law of the Courts. Both in *Zhonghua renmin gongheguo falü huibian*, 1985, pp. 34 and 82. Also see article 7 (2) of the PRC Judges’ Law enacted in 1997 and revised in 2001, in *Zhonghua renmin gongheguo Faku*, vol. 4, 2002, pp. 61-68.

<sup>6</sup> Zhang Weiping, “Sifa tizhi yu jingji tizhi” [The judicial system and the economic system], *Renmin fayuan bao*, 8 February 2002, p. 3.

judicial independence is derived from bourgeois liberalism, and is thus not suitable for a socialist judiciary.<sup>7</sup> Their concept of judicial independence [*sifa duli*, 司法独立] does not refer to the independence of the courts from the Party and state but to that of daily adjudication [*shenpan duli*, 审判独立], which is limited independence without going across the lowest political bottom line. Moreover, China's judicial independence excludes the autonomy of individual judges from other senior judges and court officials.

The courts occupy a marginal position within the centralised power structure of the Party and state. The supremacy of the Party constitutes a fundamental conflict with the rule of law for an independent judiciary. Court presidents are not part of the top decision-making process. At the local level, for example, court presidents are normally not members of local People's Congress and the Standing Committee of local Party Committee; similarly, the president of the SPC is not even an alternate member of the Central Committee of the CCP. A parallel situation exists with respect to the position of judicial and other state agencies. Even within the legal system, the court ranks lower than the PSB and the Procuratorate. Sometimes a PSB chief, not a court president, may become a concurrent official of the Party's Political and Legal Commission (*zhengfa weiyuanhui*, or shortly *zhengfawei*, the PLC, 政法委员会或政法委), which is the direct leadership of the Party on the judiciary at each level. This power structure does not provide the courts with sufficient authority to ensure a fair trial, especially those cases involving state agencies and officials.

The current judicial reform is not an integral and coherent process among different judicial agencies.<sup>8</sup> Court reform is conducted by the SPC separated from reform of other agencies. The two goals for judicial reform are judicial fairness and judicial efficiency. Although some adjustments in the current political system are necessary for supporting these goals, a genuine independent judiciary is still a distant task. According to the SPC Outline of Five-year Reform of the People's Courts issued in 1999, four problems in the judicial sector were to be resolved in a five-year span from 1999 to 2003: (1) local protectionism, which has seriously undermined the uniformity of law; (2) the overall low professional and moral quality of the judges, which have made them prone to corruption and unfit for impartial administration of justice; (3) bureaucratic management, which is at odds with judicial

---

<sup>7</sup> Deng Xiaoping (3 September 1979), "Guanyu zhengzhi tizhi gaige wenti" [On the issues of reforming the political system], *Deng Xiaoping wenxuan*, vol. 3, p. 178.

<sup>8</sup> In the PRC, the word "judicial" refers to the courts, the procuratorate and the PSB as well as agencies of Justice at all levels. I use this word here, in correspondence with most democratic countries in the world, to refer to China's courts, so does the judiciary.

independence and efficiency; and (4) a lack of resources necessary for effective functioning of the courts, especially at local levels.<sup>9</sup>

At the Thirteenth CCP Congress held in 1987, a motion to abolish the Party PLC at all levels was brought forward in order to enforce judicial independence, but the regime's concern with such disturbance as the 1989 Democratic Movement caused a halt to approval of this motion. Since then, Party control over the judicial work has been strengthened, and any advocating of judicial independence criticised as an attempt to deviate from Party leadership. Ren Jianxin, then SPC president, stated at a judicial meeting in 1990 that "the political nature of the practice of law in China is to guarantee political stability, namely the supremacy of the Party. Judicial cadres must abide by the instructions of the Party as much as legal codes. In addition to law books, judges must delve into Marxist and Leninist theories on the state and law as well as Mao's writings on class struggle." He continued: "courts at all levels must self-consciously follow Party leadership," requiring all court trials to be conducted in favour of maintaining social stability and safeguarding Party rule and the people's democratic dictatorship.<sup>10</sup>

Xiao Yang, current SPC president, called attention to the distinction of judicial independence between a Western liberal legal system and a socialist one, reiterating the importance of keeping a distance between Western ideas of power separation and the need to uphold the Party leadership.<sup>11</sup> The social order and stability have been all the time the top concerns of the Party during the promotion of economic reform and the open door policy. From the goal of establishing a market economy to the rule of law, the Party endeavours to improve its image and strengthen its rule without systematic change to the Party-state structure. In correspondence with Party tasks, the current focus of the courts is to facilitate a socialist market and consolidate Party leadership by resolving conflicts fairly and efficiently rather than trying to be independent from the Party.

#### (1) Party control over the judiciary through its PLC

Although the Party is constitutionally required to be subject to the law, "the Party must ensure that the legislative, judicial and administrative agencies and the economic, cultural and people's organisational work will all actively carried out with initiative, in an

---

<sup>9</sup> For a detail analysis of problems facing the courts and the outcomes of the five-year reform programme, see Qianfan Zhang, *supra* note 2 and also see Lubman (1999), chapter 9, pp. 250-297 for major problems facing the courts.

<sup>10</sup> Wo-Lap Lam, Willy, *China after Deng Xiaoping: the Power Struggle in Beijing since Tiananmen* (Singapore: John Wiley & Sons, 1995), pp. 263-264.

<sup>11</sup> Xiao Yang, speech at a national conference of presidents of the higher-level courts in 1999. *Fazhi ribao*, 6 August 1999, p. 1.

independent, responsible way, and in harmony.”<sup>12</sup> As the only ruling political Party, the CCP is also the guardian of socialist legality. It conducts educational programs to ensure the implementation of its ideology and the maintenance of Party line in judicial work. The Party also selects judicial officials who have good political awareness, and constantly checks whether the judiciary has strictly enforced the law.<sup>13</sup>

In practice, the Party controls court work through its PLC at all levels. The central PLC is composed of the heads from the Ministry of State Security, the PSB, the Ministry of Justice, the SPC, the SPP, and a representative from the General Political Department of the People’s Liberation Army. Similarly, local PLC are composed of chiefs from local judicial and security agencies. The main duty of the PLC is, generally, to set yardsticks for promoting social security and preventing crimes, and to discuss major cases and decide punishments. It is directly subject to the Party Committee at the corresponding levels and further to the Central Party Committee.

Since the founding of the PRC, it has been a common practice that the Party, through its PLC, guides and co-ordinates judicial work, aiming to eliminate conflicts among different agencies and to assure Party policies are being enforced. The emphasis on Party leadership of judicial work through reviewing court cases continued until 1979, when the first criminal law was enacted. Since then, instead of directly reviewing cases, the role of the PLC has changed to guiding and supervising by controlling appointment of judicial personnel and discussing major or difficult cases.

For a long time, the courts and judges have been highly politicised. Anybody who complies with the constitutional stipulation of being a citizen, with short-term training, was deemed qualified to be a judge. According to the PRC Judges’ Law promulgated in 1995, the requirements for recruiting judges greatly emphasise their political consciousness rather than their legal skills. It stipulates that any person of PRC nationality, over the age 23, who supports the constitution, has a good awareness in political and legal policies, is virtuous, healthy, and has a college-level (or above) degree in law or in other areas with at least two year’s legal experience, may become a judge.<sup>14</sup> In practice, internal training programmes within the courts have maintained most of the old personnel in their posts. The five-year outline of judicial reform plans to decrease the gross number of current court

---

<sup>12</sup> The preface of the constitution.

<sup>13</sup> Folsom and Ralph Haughword, “Constitution and the Party”, in *Law in the People’s Republic of China: Commentary, Readings and Materials* edited by R H Folsom and J H Minan (Dordrecht: Nijhoff, 1989), p. 28.

<sup>14</sup> Article 9 of the PRC Judges’ Law.



personnel by 10% within five years, but the general level of education in judiciary remains low and the post of judgeship is not very appealing to law students.

For a long time, the major sources of recruiting judges and procurators come from retired army officers, who had accepted strict political education to be loyal and obedient to the Party. This politicisation of the judiciary has been deliberately carried out by the CCP in order to enforce its political and economic tasks. Since the reforms, the appeal from scholars for professional construction of the courts and judges have increased, but practice of absorbing army veterans continues,<sup>15</sup> and political elements in selecting and promoting judges remain important. Career advancement of the judges is based on a wide range of criteria. Their professional duties consist of trying cases, enforcing the law, summing up trial experiences, taking a leading role in judicial work, and making suggestions for judicial reform. In addition, they are also expected to safeguard state, collective, and individual interests from major losses, participate in campaigns against criminal activities, and protect state and judicial secrets.<sup>16</sup>

The annual assessment of "good judges" or "judges with whom the people are satisfied" [*renmin manyi de faguan*, 人民满意的法官] evidences the politicisation of the courts. In 2001, Gu Shuangyan in Heilongjiang was honoured with the title of "good judge" for having correctly handled 2,000 cases in accordance with Party policy and law since she became a judge. Liao Wei in Guangxi was commended for sacrificing his life in confronting criminals who threatened a local school. Two judges in Zhejiang and Guangdong were commended for having collapsed and died at their post from their heavy workload. At the same time, a nation-wide campaign was launched to select judges with whom the people are satisfied. The SPC and the media co-sponsored a series of national commendations such as the "ten national judges with whom the people are satisfied", "the ten eminent young women judges", "young judges who are pacesetters", and "courts awarded first-class merit". In the same year, a total of 110 judges were commended, and 103 courts won the honour of "national model courts" or "collective first-class merit".<sup>17</sup>

Legal training to court personnel is a tremendous project due to their huge number and overall low level of education. According to a statistics in 1995, there were 250,000 court personnel nationwide, and among them only 5.6% had a university undergraduate

---

<sup>15</sup> When I went back to Shanghai in the summer of 2001, I was told that two former army veterans who are relatives of my friends were transferred to the Shanghai Higher-Level Court.

<sup>16</sup> Article 30 of the PRC Judges' Law.

<sup>17</sup> Xiao Yang, "Zui gao renmin fayuan gongzuo baogao" [the SPC working report], in *Zhonghua renmin gongheguo falü nianjian* [the PRC law yearbook] (Beijing: Falü nianjian chubanshe, 2001), p. 30.

degree and only 0.25% had a master degree. Even to the end of 2000 in fast developed area such as Shanghai, 49.2% court personnel had a university undergraduate degree [which was not amounted to half of the whole personnel] and only 1.94% had a master's degree.<sup>18</sup> To date, the process of improving the education and legal skills of judicial personnel continues but it has not been easy. According to official sources, in 2001, 540 judges were regarded as unqualified and dismissed, while more than 1,000 judges were found incompetent even after intensive training and had to be transferred to other posts.<sup>19</sup> Xiao Yang admitted recently that "a significant number (of judges) do not have a degree in law, and many are too incompetent to hold their posts," and that "courts have often been taken as branches of government, and judges viewed as following orders from their superiors".<sup>20</sup>

The poor quality of court personnel is one reason for low efficiency and corruption in the judicial sector. One direct result of this situation is the frequent ignorance of law and the wide discretion allowed to the courts. With the rapid development in the market economy and in science and technology, the demand for a competent and fair judiciary will increase. It is clear that PRC judges and courts will face severe challenges in future.

In practice, under the co-ordination of the PLC, the power of adjudication has actually been devolved to various agencies. Moreover, the PLC emphasises mutual co-operation rather than mutual restriction, often leaving the police and Procuratorate superior to the judge. Its role is to eliminate disagreement rather than guarantee justice. Judicial process is highly professional, and unprofessional interference often results in unjust outcomes. In dealing with serious or politically sensitive cases, the courts have to report to the local PLC for advice; if conflicts arise among different judicial agencies, the PLC often steps forward to co-ordinate.

Local Party secretaries regularly review cases which can affect the outcome of specific cases. For some sensitive cases involving high-ranking officials or having potential impact on social stability, the Party (sometimes the Politburo or even the top politicians) makes decisions. For example, major cases involving senior officials such as Chen Xitong, Cheng Kejie, Hu Changqing, and cases like the Xiamen "Yuanhua" smuggling scandal and serious workplace accidents and disasters, were all tried under the instruction from the

---

<sup>18</sup> Xu Ping, "Wanshan wo guo faguan xuanren zhidu de ruogan sikao" [Some thoughts about perfecting the system of selecting and appointing judges in China], *Falü tushuguan: Falü lunwen ziliao ku*, 25 November 2002, acc. 30 November 2002 ([www.law-lib.com/lw](http://www.law-lib.com/lw))

<sup>19</sup> Xiao Yang, *supra* note 17, p. 31.

<sup>20</sup> Xiao Yang, "Zuigao renmin fayuan gongzuo baogao," in *Falü nianjian*, 2001 and 2002, pp. 31-32 and p. 29, respectively.

Central Committee of the Party or even by top politicians. The courts did no more than follow these instructions, turning the trial into a complete show.<sup>21</sup>

The Party policy always determines central tasks of the courts in correspondence with its goals, and the courts are obliged to take part in all kinds of Party campaigns in conjunction with other agencies, such as campaigns of anti-corruption and "comprehensive rectification of social security" [*shehui zhian zonghe zhili*, 社会治安综合治理]. The latter includes "attacking black and evil (forces)" [*da hei chu e*, 打黑除恶, refers to organised crimes emerging in China recently], rectifying market order, popularising legal knowledge, and promoting citizens' moral standards. All of these campaigns aim to maintain social stability and Party rule.

In practice, some PLC often abuse their power to serve their own interests. For example, according to state law, the State General News agency is the only authority with the power to issue accreditation cards to journalists, and these cards authorise the holder to conduct interviews with all state agencies. However, the Hunan provincial PLC required additional accreditation for journalists, especially from outside their region, to interview local judicial agencies and personnel.<sup>22</sup>

The following case reveals that the PLC often manipulates the judicial authorities within its jurisdiction.<sup>23</sup> In the 1980s, Party and administrative agencies at all levels were widely involved in business activity. Following this trend, Lan Hai, an official in the Sichuan PLC, resigned in 1994 and established a company under the name of "Sichuan zheng-fa-wei fazhi xuanchuan zhongxin" [Sichuan PLC centre for promoting the legal system]. The company produced a TV series called "*fazhi zhi guang*" [light of the rule of law, 法治之光] in co-operation with the provincial TV station. The PLC Centre was operated on an autonomous basis; the PLC did not invest any money or undertake any risk. The link that the PLC itself had with the Centre was that it gave permission for the use of its name for an annual fee of 20,000 *yuan*. In addition, PLC officials debited their entire mobile phone and banquet bills against the Centre's account, amounting to 180,000 *yuan* over five years.

In 1999, when the separation of government and business was accelerated, the Centre stopped using the title PLC in its name and also cut its links with the TV station. The renamed Centre for Promoting the Legal System became wholly independent from any state

---

<sup>21</sup> For the case of Chen Xitong, former Beijing mayor who was sentenced to 16 years of imprisonment, see *Zui gao renmin fayuan gongbao* [the SPC Gazette], no. 3 (2000), part x; for the case of Cheng Kejie, former Guangxi supreme officials who was sentenced to death, see *Zui gao renmin fayuan gongbao*, no. 5 (2000), pp. 161-162.

<sup>22</sup> *Renmin Wang*, 11 October 2001 (<http://www.people.com.cn>).

<sup>23</sup> *Boxun*, 19 August 2003 (<http://peacehall.com/news/gb/pubvp/2003/08/200308190711.shtml>).

agency and operated wholly as a private business. Its programmes were very popular and it became very prosperous. No attempt was made to recover the 180,000 *yuan* from the PLC. Nevertheless, in April 2001, the PLC accused Lan Hai of corruption and appropriation of public money. It instructed the local PSB to arrest Lan Hai and instructed the local prosecutor and court to accept the sentence it had already determined. Through the PLC's control over the court and appellant trials, Lan Hai was eventually sentenced to 14 years of imprisonment. In this case, all Sichuan judicial authorities, including defence lawyers, were subject to the PLC's authority, resulting in a complete miscarriage of justice and failure in protecting property rights.

This case, like the one discussed before, is an example of the many conflicts between the state and individual interests. Here the conflict happens within the legal system which is supposed to resolve such conflicts. In China, PLC interference with law enforcement is invisible but influential in that it makes decisions outside the formal legal procedures through manipulating judicial agencies. By controlling the appointment of judicial personnel and designating annual campaigns, Party PLC becomes an invisible supreme judge without actually hearing or trying cases or without its name appearing on any legal documents. Compared to other interference from administrative and legislative agencies which are external, visible and subject to check, PLC interference is carried out behind the scenes, systematic and not subject to challenge.

The existence of Party PLC is typical in a legal system of the Party-state structure. This practice shows that the Party is in fact above the law, and that the rule of man overrides the rule of law. Scholars like Cao Siyuan, Zhang Yinhong and Wang Yi, together with some senior officials like Li Rui and Qiao Shi, have called for the removal of this institution at all levels, in order to safeguard governance according to law.<sup>24</sup> They state that judicial independence is a constitutional principle in a state based on the rule of law, having the utmost significance in curbing state power and in resolving conflicts among citizens and between citizens and the state. This practice in China also provides ample opportunities for judicial failures and corruption, since Party supremacy over the legal system makes it difficult for the law to curb power.

These scholars and officials claim that there is no legal basis for the role of Party PLC whether from the constitution or from other state laws. It has been built up through the

---

<sup>24</sup> Cao Siyuan, "Zhengfawei weixian" [the PLC is in breach of the constitution], *Qianshao* (May 2003); Zhang Yinhong, "Zhengfawei fang'ai sifa duli" [The PLC hampers judicial independence], *Yanyuan pinglun* (Beijing University). Both are quoted in *Boxun: public opinion* (<http://peacehall.com/news/gb/pubvp/2003/08/20030811104.shtml>) and (<http://peacehall.com/news/gb/pubvp/2003/07/200307301525.shtml>).



national Party network as a tool of Party control over the legal system. The PLC leadership of the judiciary is also in conflict with international conventions and declarations concerning judicial independence. They consider that Party interference in judicial work has caused injustice in many cases and encouraged local protectionism. If the Party and its government refused to respect the authority of the courts, it will be impossible to elevate the dignity and authority of the judiciary and the law.

## (2) Internal influence over the courts and judges

Within each court, there is a Party Organisation [*dang zu*, PO, 党组] and an Adjudicating Commission [*shenpan weiyuanhui*, AC, 审判委员会]. The PO acts to ensure that court work complies with Party lines and is directly responsible to the local PLC. The AC has the power to discuss, instruct and approve major or difficult cases.<sup>25</sup> The heads of the courts, who are normally members of both PO and AC, are not judges but officials assigned by the local Party and government. Their main job is to develop and maintain a harmonious relationship between the courts and local authorities, since this relationship determines the financial and other welfare of the courts as well as the promotion of senior members. Within the courts, the PO controls the appointment and promotion of judges, and at the same time, it influences the decision-making process of the AC.

The trial process is subject to various internal reviews based on the courts' hierarchical system. AC membership is not a professional qualification but a political title in correspondence with administrative rank. So, only officials who have a certain rank in the army or other state agencies may be selected. Since the PO has the discretionary power to nominate a person for AC membership, the AC usually abides by PO instructions to make sure that Party policy and goals are being enforced. There are separate benches for civil, criminal, administrative, economic, marine, intellectual property rights and enforcement of court decisions. All final decisions are subject to a superior approval ranging from the presiding judge [*shenpan zhang*, 审判长], in the collegial panel [*he yi ting*, 合议庭], a bench chief judge [*ting zhang*, 庭长], the AC, and the president or vice-president. In some circumstances, the courts need to ask the PLC for instruction.

This internal review may be helpful in constraining judges' power of decision-making in order to assure the quality of their judgement. However, both China's practice of the AC deciding difficult cases and the appeal system are carried out by reviewing case files without having a process open to the parties. Moreover, it is often the AC, who are not the

---

<sup>25</sup> Art. 11 of the Organic Law of the Courts.

presiding judges, that makes a final decision rather than the appellant judges. It may provide a degree of accountability and constraint, but this practice, trying a case based on files rather than holding a hearing and the judges who decide a case are not the judges who try the case, are obviously at odds with the principles required by the rule of law. China's administrative rule based on democratic centralisation requires that lower courts report a pending case and request advice from a higher court, and inside a court, the court leaders often give instructions for a pending case to the presiding bench of the case. Sometimes, judges who are not on the presiding bench for a case may step in when the case is still in hearing, ignoring the procedural guarantees for a trial.

Individual judges have no independent power to make a judgement in court, except in some cases of summary procedure. The titles given to judges represent different administrative ranks from junior to senior. Under the AC, collegial panels, usually consisting of at least three judges selected at random before the trial, preside. The final judgements are made in the name of the courts rather than the collegial panel or an individual judge. Thus the power of independence, if it exists, is vested in courts, not judges. The president and bench chief may have a legitimate right to review a judgement or suggest changes in drafting judgements prepared by collegial panels. Where a case is considered complicated or important, the AC often makes a decision rather than the trial judges or collegial panels. As Donald Clarke puts it, "those who try the case do not decide it, and those who decide the case do not try it."<sup>26</sup>

This internal collective review of cases by senior judges or the AC departs from Western ideals of judicial independence, which is a practice with Chinese characteristic derived from the principle of democratic centralism that applies to all state agencies of the party-state.<sup>27</sup> This practice might be justified in some circumstances to guarantee the accuracy and impartiality of judicial decisions and to support judicial independence in China from improper outside influence. This is particularly necessary in terms of the general low level of professionalism among judicial personnel and widespread judicial corruption. As Zhang Zhiming claims, this practice is a rational Chinese response to current conditions and is therefore more appropriate than the Western ideal of judicial independence; even if the judiciary was genuinely independent, the system would still lack judicial fairness and the rule of law, and judicial corruption would keep growing.<sup>28</sup>

---

<sup>26</sup> Donald C Clarke, "Dispute Resolution in China", *Journal of Chinese Law*, no. 5 (1991), p. 260.

<sup>27</sup> Lubman, 1999, p. 262.

<sup>28</sup> Zhang Zhiming, "Guanyu shenpan weiyuanhui gaige de sikao" [Thought about reforming the AC], *Renmin fayuan bao*, in Jiancha ribao website: *Zhengyi wang*, 28 October 2002 (<http://211.100.18.62/fzdt/xwnr.asp?id=8296>).

Sometimes, AC reviews indeed help to maintain the impartiality of a trial. However, this practice seriously hampers the autonomous adjudication of the courts and judges since it permits interference with the collegial panel's function. The function of the AC is to deliver judgements on individual cases according to current Party and state policy rather than to assure impartiality. Cases in administrative litigation are usually considered to be important and are therefore referred to the AC, leading to illegal administrative actions being often affirmed by the court under pressure.

For example, the collegial panel sitting on an administrative case in a county court reached a decision in favour of repealing the action made by the defendant administrative agency. The president of the court, under pressure from the local government, then referred the case to the AC in order to change the panel's decision. However, the AC reaffirmed the decision reached by the collegial panel by a vote of 9 to 2. Then the president persuaded the AC members to change their vote immediately after the meeting. A second vote was carried out with the vote at 7 to 4 in favour of the panel's decision. Again, the president further persuaded the AC to call for a third vote. This time, the result turned out to be 6 to 5 against the previous decision, due to the absence of a member who supported the panel's decision and the participation of a vice president who happened to miss all previous votes. In the end, the court had to follow this final decision, and let the illegal administrative action be upheld.<sup>29</sup>

In another case, Huang, a young woman who went to the job centre of the Wulong county government, Chongqing, to seek a job in November 1997, was raped by Luo, the director of the job centre. The local PSB reported the case to the local Party PLC, suggesting exercising both Party discipline and judicial procedures on Luo. But the PLC convened a work meeting participated by the first-rank officials [*diyi ba shou*, 第一把手] from local Party, government, and monitoring authorities to reach the decision that Luo had made a mistake by taking advantage of his position to have a sexual relationship with the woman rather than accuse him of having committed the crime of rape. According to the Party democratic centralism rule, the judicial agencies must obey this decision.<sup>30</sup>

---

<sup>29</sup> Yang Zhizhu, "E si mo zhuo zei, qi si mo gaozhuang: Zhongguo dalu jiceng fayuan de guancha yu sikao" [Do not become a thief even if you starve to death and do not go to the court even if you are angry to death: Observance and thought of China's basic-level courts], *Zhongguo yanjiu*, no. 3 (1997), quoted in *Boxun* news, 19 August 2002 ([www.buxun.com](http://www.buxun.com)).

<sup>30</sup> Song Caifa, "Yi fa xingzheng shi yi fa zhi guo de nandian he guanjian" [Exercising administrative power according to law is the most difficult point and the key to the administration of the country according to law], *Shehuizhuyi yanjiu*, no. 1 (2000), pp. 52-55.

### (3) Administrative influence from local government

In China, since local judges and courts are appointed and funded by local authorities, they often seek to protect local interests while sacrificing or even infringing interests of outsiders. Decentralisation of the economy has increased the dependence of local government on local enterprises for revenue, so local governments employ all means to encourage and control the development of the local economy. Local protectionism can cause potentially serious damage to the effort to build a national market economy.

Human resources, budgets and benefits in the courts are all controlled by governmental agencies at the equivalent level, and the local judiciary is an administrative agency with no difference from other governmental agencies. This institutional arrangement further exposes the courts to day-by-day pressure from powerful agencies. The local administration may persuade a litigant party to withdraw a lawsuit, which involves an administrative defendant or a local party. They may also ask the trial judges to issue an unjust or even illegal judgement, or they may transfer a judge who tries to be impartial. By being subject to local authorities, courts at the local level become the local government's courts.

The problem in enforcing court judgements [*zhixing nan*, 执行难] has become a regular focus in the SPC annual reports submitted to the NPC and has received prominent coverage in the press since 1988. This not only reflects the weakness of courts in protecting rights and resolving conflicts, but also shows the reality of local protectionism. Since there is a long tradition in China of suspicion towards the courts and litigation, the execution of court decisions, therefore, is crucial in enhancing confidence in the courts. "Even when parties overcome traditional reluctance to sue and persevere through litigation to obtain a favourable judgement, they may fail to vindicate their claim because of difficulties in enforcing court judgements".<sup>31</sup>

One major function for the law and courts is to safeguard property rights. Thus, whether a legal system can provide security for the economic interests of different market actors will have great influence on the future of the market economy and the rule of law. Unlike criminal and administrative decisions, which can be enforced through state coercive means, civil and economic judgements, which are crucial to safeguard property rights, are mainly enforced by litigants' voluntary actions. However, the institutional powerlessness of the courts has become one reason for the difficulty of enforcing judicial decisions.

Official texts show the low rate in enforcing court judgements, attributing the major reason to local and departmental protectionism. For example, Xiao Yang highlighted the

---

<sup>31</sup> Lubman, 1999, p. 266.



dilemma of judicial enforcement. In a report submitted to the NPC in 2001, he admitted that this problem remained uncorrected, especially in economic decisions. Even if some judgements were executed they were usually carried out at the expense of legality or involved violent resistance. He claimed that local protectionism created a formidable obstacle to the enforcement of judgements against local individuals or enterprises.<sup>32</sup>

When disputes arise between a local enterprise and an outside one, under pressure, local courts may favour the local litigant either by unfairly giving judgement to the litigant or failing to enforce a judgement against that litigant. On some occasions, local protectionism even covered up criminal acts. Some local courts, at the request of the local administration and enterprises, have gone outside their jurisdiction to apprehend a litigant or to take a person hostage for debt collection; sometimes, they have used courtrooms to detain a disputant to force him to accept certain conditions about the case.<sup>33</sup>

Local protectionism has challenged strongly the weakness of the central government and the legal system. Disobedience to court orders is thus quite common since the courts do not possess greater authority than other agencies. Some agencies, such as the banking system, which usually has the duty to assist in enforcing court judgements, is often reluctant to co-operate since it is parallel to the courts in the administrative hierarchy.<sup>34</sup>

In 1999, the Central Committee for Discipline and Investigation (the CCDI) and the Ministry of Supervision, both being internal surveillance agencies for Party and government officials, respectively, issued a notice, calling for a strict check on acts involving illegal and irregular enforcement of judicial judgements. The notice shows how some governmental departments deliberately create obstacles to the enforcement of court decisions, and how some cadres ignored or set themselves above the law through arbitrary interference in judicial work. It highlights six ways in which local governmental agencies hamper the enforcement of court decisions.<sup>35</sup>

- 1) By using an official post or political power to replace the law, either through “writing a note” [*pi tiaozhi*, 批条子] to or “having a word” [*da zhao hu*, 打招呼] with the court or judges;
- 2) By making or issuing illegal regulations, documents, and instructions in relation to specific cases to show favouritism to local or departmental interests;

<sup>32</sup> Xiao Yang, SPC working report, in *Falü nianjian*, 2001, pp. 30-31.

<sup>33</sup> Cao Siyuan, “Reform Court System to Deal With Localism”, interviewed by the *VOA*, 30 March 1998.

<sup>34</sup> For example, see Donald C Clarke, “Power and Politics in the Chinese Court System: The Enforcement of Civil Judgements”, *Columbia journal of Asian Law*, 10:1 (1996), pp. 1-92.

<sup>35</sup> *Renmin ribao*, 19 October 1999, p. 3.

- 3) By concealing, transferring or secretly distributing public property of SOEs, or by inducing SOE workers to hold a demonstration to resist court officials;
- 4) By refusing to assist court enforcement, especially of outside decisions, even when these agencies have a legal responsibility to assist such enforcement;
- 5) By restructuring and rearranging enterprise ownership to forge a bankruptcy or a false mortgage to escape debts;
- 6) By refusing (in the case of local courts) to enforce a decision made by another court against a local party, or postponing and even pending such an enforcement.

Thus the authority of PRC courts has been seriously undermined by powerful administrative interference.

#### (4) Social connections and networks

In addition, complicated social and personal connections or networks [*guanxi* or *renqing*, 关系或人情] also undermine judicial independence. The maintenance of established institutional and individual relationships has always been important in China throughout its history. Judges may take advantage of their localised position and keep long and stable relationship with a wide range of people and agencies, such as relatives, neighbours, classmates or friends, lawyers, governmental officials and managers, as well as governmental agencies and companies. They both benefit and feel pressure from such a wide connections during their daily work.

The low salaries of the judges make them easy to face external influence and financial temptation. For example, a judge may often need to travel to collect evidence that is difficult to obtain, such as evidence held by a bank or other state agencies. Since the allowance for such travel is low, it is often supplemented by one or both of the parties involved in the case. It is widely believed that the party that travels together with the judge is most likely to win the case. Sometimes, judges meet with one of the parties and their lawyers outside the courts without the other party's presence. The meeting may be held over dinner table or on other informal occasions. Judges often seek financial contributions from both sides, giving rise to a popular saying in contemporary China "(judges) eat the plaintiff and then the defendant while attributing the reason of this to the imperfection of the legal system" [*chi le yuangao chi beigao, hai shuo fazhi bu jianquan*, 吃了原告吃被告, 还说法制不健全].

Being subject to so many internal and external influences, China's judicial system thus lacks independence and is relatively powerless. This is shown in at least three ways. First, courts have no power to interpret laws and regulations but may only apply them, and

their judgements have no formal value as precedents. In Western countries, judges have the right to interpret laws and set precedents. In China, only legislative agencies have the power to interpret laws and regulations. Moreover, courts cannot invalidate any regulations even if they are in conflict with state laws.

Secondly, the jurisdiction of the courts is limited. For example, some Party and governmental officials in practice are above the law. Corrupt officials or law-breakers are not dealt with by the courts but by Party discipline. The Party CCDI decides on whether to punish them according to Party rules or to transfer them to the courts. Party officials in CCDI have judicial power in investigating corrupt officials, such as confiscating travel documents, videotaping suspects without their knowledge and freezing bank accounts. In addition, a huge number of cases involving ideological dissidents and minor crimes are dealt with directly by administrative measures either by SI or RETL rather than by the courts.

Finally, there is an excessive number of reviewing on court judgements. Cases may be reopened and reviewed even without any request by the parties, but simply as administrative supervision. They may be reviewed by the same court that rendered the original judgement or by a higher-level court. If the SPC or a higher-level court discovers an error in a lower-level court, they may either review such matters themselves or order a retrial at the lower level.<sup>40</sup> The Procuratorate may also request a case to be reopened. The decision whether a judgement is wrong or needs to be reviewed is regarded as an internal matter within the relevant institutions. The selection of cases for review is usually based on the potential public impact or merely for quality control. Re-adjudication is highly flexible and the procedure is informal, resulting in frequent favouritism.

The multiplicity of review processes is an example of the different concepts of judicial systems in the West and in China. As Lubman notes, in the West, one must not request to reopen his case based on the same facts and issues as long as he/she has had a fair and full trial. This is to uphold procedural justice and judicial authority even if doing so at the expense of some substantive justice. However, China's legal system rarely encourages any procedural justice while sacrificing a substantive outcome. This has "obvious implications for the attainability of the rule of law in China," and it "introduces instability and variability that runs counter to the Western ideal of the rule of law, especially if outcomes are revised for political reasons."<sup>36</sup>

The following case shows how difficult it is to make a court judgement final. In 1997, two businessmen Ma Deming and He Guicai dissolved their partnership to operate a

---

<sup>40</sup> Arts 177 and 179 in the Criminal Procedural Law.

<sup>36</sup> Lubman, 1999, p. 271-272.

coke plant because of conflicts. According to their agreement, He was to pay back Ma his investment of 461,653 *yuan*, but He failed to do this. In 1998, Ma sued He at the Lüliang Intermediate-Level Court (LILC), Shanxi. The court ruled that the defendant, He, should return money with interest and litigation costs. The defendant did not appeal and thus the decision came into effect.

However, although the defendant did not make an appeal, the case was reopened four times; each time the plaintiff won, but the court decision was still not enforced. When Ma made inquiries, a senior judge told him: "You do not know the law. Engaging in a lawsuit [*da guansi*, 打官司] is just like a game of ball, where the ball goes from one side to another for several rounds until one side finally wins two out of three matches..."<sup>37</sup> In 2001, the vice-president of the LILC interviewed Ma after his repeated appeals, and ordered the enforcement of the initial ruling. By that time, however, the assets of the defendant, which had been frozen before the trial, were gone, and Ma was left with heavy debts and the family suffered serious deprivation. In early 2002, Ma was informed that the provincial higher level court in Shanxi (SHLC) had suspended enforcement again because it had decided to retry the case. To date, the case is still pending and Ma has not received any redress.

A LILC judge in this case revealed that the reason behind the re-trial was that the defendant used official connections to have the case reopened many times, in order to reduce the amount due to Ma. He warned Ma not to seek support from high levels even if the ruling was not enforced in future, since the defendant would only continue to seek help. This case shows the difficulty in enforcing rulings even in very straightforward cases.<sup>38</sup>

## 2. Judicial fairness and efficiency

The close institutional connection between the judiciary and Party-government, the internal review of cases within the court system, and dependence of individual judges on their superiors and social networks, all undermine court authority and function. At the same time, the low level of education and professionalism among judges also causes mistakes and abuses. In order to assure judicial justice and efficiency, an independent and accountable judiciary are needed. In China, there is a lack of institutional guarantee for a real independent judiciary, and efforts in building judicial ethic and standard begin just recently. In latter case, there is a long way to go.

---

<sup>37</sup> See *Fazhi ribao* online, 6 September 2002 ([www.legaldaily.com.cn/gb/content/2002-09/06/content\\_42832.htm](http://www.legaldaily.com.cn/gb/content/2002-09/06/content_42832.htm)).

<sup>38</sup> In February 2002, Ma knew from the LIPC that the SHLPC ruled to suspend the enforcement of its final decision because it decided to retrial again. But Ma did not receive such ruling yet. At last, the SHLPC revoked this ruling of suspending the enforcement and retry the case. *ibid*.



### (1) Judicial unfairness and corruption

Judicial fairness not only requires structural arrangements but also requires social and cultural conditions in which broad beliefs and expectations of judicial independence are cultivated among the public including judges. Many PRC judges are often too poorly trained to perform their duties. Even if many legal training sessions have been conducted, incompetence in the judiciary remains a serious problem to this date. Besides, raising professional standard alone cannot resolve structural deficiencies in which the courts are not independent but subject to Party leadership and local government. Moreover, the courts have been deeply involved in serious corruption, which is a part of widespread corruption among all state agencies. Too many judges use their power to pursue personal interests.

All of these problems cause serious damage to the authority of the courts and the fostering of a legal culture. Appeals for more effective supervision over the judiciary have been frequently made by scholars and politicians, whose proposals include legislative supervision over individual cases by People's Congress at all levels, holding the judges responsible for their wrong decisions, and referring pending cases to superior judges for advice. The proposals might compromise judicial independence, however, in China, more concerns and efforts have been given to control judicial corruption than to judicial independence. In other words, the latter is clearly not the priority at the moment in public's concern. Yet liberal scholars, such as Cao Siyuan and He Weifang, have called for a genuine judicial independence, dealing with localism through establishing a federal court system and changing judges' working venue from time to time, and a decent salary for judges to foster their clean and just virtues.<sup>39</sup>

### (2) Efficiency and right protection

Judicial fairness [司法公正] and judicial efficiency [司法效率] are two goals for China's judicial reform in the SPC Five-Year Programme. In recent years, China's courts have taken steps to improve efficiency in the face of rising caseloads and stagnant resources. However, there is always a risk that gains in efficiency may come at the expense of justice. The proportion of criminal cases tried according to summary procedure ranges from 25% to 60%

---

<sup>39</sup> Cao Siyuan, 18 April 2001, in *World Economic Forum: China Business Summit 2001* ([http://www.weforum.org/site/knowledgenavigator.nsf/Content/\\_S4229?open](http://www.weforum.org/site/knowledgenavigator.nsf/Content/_S4229?open)); He Weifang, "Faguan zhiyehua shi fazhi xiandaihua de zhongyao biao zhi: faguan zhiyehua zhuanjia luntan" [The professionalisation of judges is an important mark of modernisation of the rule of law: Experts Forum on judges' professionalisation], in *Beijing University* website, 9 July 2002 ([http://article.chinalawinfo.com/article/user/article\\_display.asp?ArticleID=26366](http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=26366)).

of total criminal cases in some courts.<sup>40</sup> Although there are gains in efficiency, there has been little or no discussion of the effects of such procedural reform on justice or defendants' lawful rights and interests. Some judges may be encouraged to persuade defendants to accept summary trial, overlooking problems found in evidence, especially in confessions. For example, in some cases, judges have failed to inform defendants of their rights to a full trial, or to explain the consequence of agreeing to simplified procedures.

In principle, if defendants raise objections to summary procedure, they have the right to full procedures, but this right is often denied by judges on the pretext of needing to resolve old caseload. The real problem lies elsewhere. Firstly, the criminal system in China has an inherent imbalance of power among three judicial agencies, with the PSB enjoying the most powerful position. Neither the statute law nor the other two judicial agencies have the authority to curb police abuses of human rights during criminal investigations. Cases that involve police use of torture in extracting evidence are often decided according to summary procedures, while the Procuratorate and courts ignore the fact that evidence has been obtained by such illegal action, especially during annual "strike hard" campaigns. Secondly, the three agencies are all part of the Party-state apparatus, which requires them to co-operate rather than co-curb. Thus any doubts about a case or evidence will not affect their determination to speed up the rate of resolving criminal cases. Finally, there is no powerful legal representation to safeguard defendants' rights. Thus, the defendant involved in a criminal process is excessively vulnerable.

Efficiency must not be maintained at the expense of fairness. A fair trial requires being open to the public, conducted according to due process and with access to lawyers. In China, however, procedural justice is frequently ignored, open trial is not guaranteed, legal representation is often restricted, and legal aid is very limited. As a result, miscarriage of justice and infringement of rights are common. At the same time, the number of unresolved cases is increasing every year, and difficulties in the enforcement of court decisions persist.

The importance of evidence is not emphasised in judicial practice, which is important for a fair trial. Courts are required under the CPL to make judgements by "taking the facts as the basis and the law as the yardstick" [*yi shishi wei yiju, yi falü wei zhunshen*, 以事实为依据, 以法律为准绳]. This requirement is based on political considerations rather than legal principles, and is evidence of political interference in judicial work; it follows the traditional emphasis on substantive justice while ignoring due procedures. PRC law provides

---

<sup>40</sup> Jeffery Prescott, "Efficiency and Justice in Summary Criminal Trials," *Fazhi ribao*, 24 July 2003, p. 8 ([www.legaldaily.com.cn/bm/2003-07/24/content\\_39533.htm](http://www.legaldaily.com.cn/bm/2003-07/24/content_39533.htm)); also in *The Chinese Law Centre in Yale Law School* ([http://Chinalaw.Yale.edu/pdf/JPEfficiency\\_eng.pdf](http://Chinalaw.Yale.edu/pdf/JPEfficiency_eng.pdf)).

that as long as the main facts are clear and the main evidence is sufficient (even if there is an element of reasonable doubt), the accused will be found guilty as charged. The rule of law, however, requires that judges rely on evidence rather than facts to try a case; facts must be subject to proof by lawful evidence before they become meaningful at a trial, and only then do facts become legal facts or legal truth.

The principle of open trials may also be ignored due to the low level of professionalism in the courts. For example, judges are reluctant to conduct open trials because they are used to making decisions on the basis of files and interviews and lack confidence in the procedures of open courts. They are especially reluctant when it comes to economic disputes, because they lack expertise in economic and financial matters.<sup>41</sup> Moreover, current law stipulates that politically and religiously sensitive cases and cases concerning state secrets or personal privacy may not be open. Open trials have been a goal of judicial reform. In practice, however, cases that go to open trial are carefully selected to serve the purpose of legal popularisation and maintaining social stability. Admission for a selective case to be open to the public is limited to a Chinese citizen with a PRC identity card.

Thus there are many obstacles to a fair trial, and the judicial process is full of unfairness and corruption. At the same time, judicial efficiency cannot be ensured, since the courts and judges are exposed to interference from many sources. The difficulty of enforcing court judgements is a good example of poor efficiency. While court judgements are difficult to enforce, there has been an increase in extra-judicial means to resolve disputes. As Lubman summarises based on statistics in PRC law yearbook throughout 1991 and 1997, 64.6% of the total settled cases were done so through mediation in 1990, the proportion increased to over 51% of the total number of settled cases in 1998 from one million to three million. He notices that the number of cases resolved through adjudication has also increased during the period 1991 to 1998, which rose from 19.1 % of the total number to 48.6%.<sup>42</sup> In 1999, 1,500,264 of 3,519,244 civil cases were resolved through mediation or 42.6% of the total number of decided cases; 631,829 of 1,529,877 economic cases, or 41.2% of total cases, were mediated.<sup>43</sup> The mediated cases have shown a trend of decreasing in terms of the proportion among the total cases, but the number remains tremendous, especially if taking account the general increase of caseload over this period.

There is nothing improper in mediation itself because extra-legal means have been accepted as efficient and convenient method to resolve disputes in many countries today. In

---

<sup>41</sup> Lubman, 1999, p. 260.

<sup>42</sup> Lubman, 1999, p. 273.

<sup>43</sup> *Zhongguo tongji nianjian*, 2000, p. 760.

China, however, the reasons for judges to favour more mediation in resolving cases than adjudication may not merely for its convenience but for some other reasons, such as influences from outside and financial interests, or avoiding embarrassment due to ignorance of specific knowledge needed in trial. The process of mediation is often full of compromises and unlawful practices, and sometimes coercion is used to force one party to accept a decision. Instead of safeguarding rights, mediation may prevent individuals from exercising their legal rights. Mediation not only undermines court credibility but also discredits its own role as an informal mechanism. Unfairness in mediation furthers people's distrust in courts and the law, encouraging them to use informal means through seeking connections and bribery the judges in resolving their disputes.

### (3) Failure in judicial review of Party-state power

The low status of the courts poses particular difficulties in curbing state power. According to the ALL, citizens are entitled to sue state agencies (*min gao guan*, 民告官, literally in Chinese an citizen sues an authority or official). However, the courts cannot check a criminal investigation carried out by the police under the ALL. This is counter to the general principle that the police may not deprive anyone of his freedom or impose any penalty without court decision.<sup>44</sup>

As discussed in Chapter Three, the PSB carries out general management of social security, which is defined as an administrative act and thus within the jurisdiction of the ALL. However, two major administrative coercive measures (SI and RETL), which are used to detain hundreds of thousands of people each year, are not subject to judicial review despite breaching the constitution and law. In addition, misconduct committed by Party members and state officials is usually not reviewed by the courts but by Party and administrative discipline institutions.

In China, the enforcement of the ALL meets with strong resistance from state agencies and officials. An ordinary citizen or company usually faces great obstacles in challenging authorities and officials, and the courts have only limited authority to hold powerful agencies accountable for their abuses. Problems in this area are many. An administrative agency may deliberately fail to inform citizens of their right to file a charge or delay this information so that the statute of limitation expires. The affected party may be poorly aware of his right to litigation or may be prevented from using this right. The courts may be reluctant to deal with an administrative case, since the local judiciary is subject to local authorities or simply because there are close institutional interests between the courts

---

<sup>44</sup> A W Branley & K D Ewing, *Constitutional and Administrative Law*, p. 532.



and local agencies. Finally, ordinary defendants may be refused permission to attend the trial or present evidence, while powerful defendants may even threaten the plaintiff or the presiding judges.

In this situation, although there was an increase in administrative litigation from 13,006 in 1990 to 93,642 in 2001,<sup>45</sup> the general rate of increase remains low as compared to other cases in the same period. There has been an average of less than twenty such cases each year nationwide, with a maximum of thirty-three in 2001. Some courts did not accept a single such case in a year. Among the cases that the courts accepted, two-thirds did not come to trial or to a court ruling, usually because the plaintiff withdrew. The success rate for plaintiffs was below 20%.<sup>46</sup>

The nationwide rate of withdrawal during this specific period was over one-third of all cases at the first instance, and at maximum 57.3%. The withdrawal rate in some courts amounted to 81.7%.<sup>47</sup> Many lower courts had no or very few administrative cases to try, and the administrative bench in some courts could not operate because of inadequate personnel to form a collegial panel.<sup>48</sup>

Reasons behind this high rate include: (1) the defendant administrative agency corrected its wrong action after the litigation, in which the agency usually made its decision without following legal procedures or having abused its power while not realising its mistake until it was sued. In this case, the plaintiff considered that his interests had been safeguarded and thus dropped the suit which undermined the lawful interests of many others who had been affected by this governmental action. (2) the plaintiff feared losing the case would bring more trouble in future from the defendant, for he believed that the court would protect the defendant agency rather than stand up for a civilian due to mutual protection among state agencies [*guan guan xiang hu*, 官官相护]. (3) the plaintiff dropped the charge due to

---

<sup>45</sup> However, cases of this type became fewer after 1998, declining at the rate of 21% in 2000. One reason for the decline is the implementation of the new Administrative Redress Law in 1999, which opened up more areas for administrative reconsideration rather than for judicial review.

<sup>46</sup> Ying Songnian, "Wanshan xingzheng susongfa zhuanjia tan: xiugai xingzheng susongfa shi zai bi xing" [Experts talk about the perfection of the ALL: it is bound to revise the ALL], *Fazhi ribao*, 3 March 2002, p. 3.

<sup>47</sup> He Haibo, "Xingzheng susong chesu kao" [Reflection on withdrawal of cases in administrative litigation], in *Zhongguo xingzheng faxue jingcui* [Quintessentials of China's administrative jurisprudence] (Beijing: Falü chubanshe, 2002), p. 204.

<sup>48</sup> Bao Wanchao, "Min gao guan: zhongguo de xianzhuang, kunhuo yu gaige—Guangxi, Ningxia liang qu xingzheng susong de shishi wu zhounian shikuang diaocha fenxi" [Citizens sue officials: China's present status, puzzlement and reform—report on investigating the reality of the fifth anniversary in implementing the ALL in two regions of Gaungxi and Ningxia], *Zhengfu fazhi*, no. 5 (1996), pp. 4-7.

pressure and a threat from the defendant. (4) The court persuaded the plaintiff to withdraw the case, especially when the defendant was most probably going to lose the case.<sup>49</sup>

Even if the court eventually tries an administrative case, the defendant is likely to ignore the judgement and the court can do nothing about this. For example, a businessman, Ma Yijun, obtained permission for land development in 1995 in Mishan, Heilongjiang. In 1996, Ma sued the builder, and during the second trial, some local officials tried several times to intervene in the case without success. When the court was about to make its decision in 1997, the local government issued a document to put the relevant land to tender irrespective of the fact that Ma was the legitimate developer. At the tender meeting, the local government gave Ma's land development right to his adversary, the builder. Ma sued the local government under the ALL for infringing his rights.

In 1999, the court rescinded the document issued by the defendant on the grounds that it breached legal procedures for failing to inform the plaintiff of his right to a hearing when transferring the land to the other party, and that the local government (the defendant) could not intervene in a civil dispute since it was not a relevant party. The court ruled that the defendant should return the land to Ma. However, the defendant refused to obey the court decision.<sup>50</sup>

The following case<sup>51</sup> is another example of an administrative agency acting counter to the law, and also shows the difficulties faced by an ordinary citizen suing a state agency. Wu Chengnong was a farmer in his seventies from Rui'an, Zhejiang. In 1975 he built up a two-storied factory after approval from the village Party Committee. In September 2000, the Rui'an authority decided to bring the local environment under control by clearing up the streets and demolishing unregulated buildings. Wu accepted a notice from the local Planning Bureau in which his name was misspelled as Song Rong'an, ordering him to demolish the factory before 26 September on the grounds that the building had breached the city planning regulation. Wu ignored the notice since it seemed not to be addressed to him. On the morning of 27<sup>th</sup>, however, the town head brought some people to the village to demolish the factory, leaving all the machinery buried in the rubble.

In October, Wu brought about an administrative lawsuit to the local court. The court tried to protect the buried machinery for evidence, but the local authority in charge of construction together with the township government used a bulldozer to destroy it. Wu then

---

<sup>49</sup> Li Yun, "Guanyu xingzheng anjian fei zhengchang chesu de sikao" [Reflections on abnormal withdrawals of administrative cases], *Zhongguo fayuan wang*, in *Zhengyi wang (Jiancha ribao)*, 5 June 2003 (<http://211.100.18.62/fzdt/xwnr.asp?id=9358>).

<sup>50</sup> *Fazhi ribao* website ([http://www.legaldaily.com.cn/gb/content/2001-04/content\\_16063.htm](http://www.legaldaily.com.cn/gb/content/2001-04/content_16063.htm)).

<sup>51</sup> "Che fang che chu xingzheng guansi lai" [An administrative litigation arises from the demolition of a factory], *Fazhi ribao*, 5 September 2002, p. 8.

started another suit for civil compensation for his property rights. The court tried the case in March 2001. Wu's lawyer proved that the disputed factory was not an illegal building, and that the local authority acted illegally by demolishing the factory and then destroying the evidence. The joint defendants (Planning bureau and the township government) refused to accept responsibility. The court ruled in favour of the defendants on the grounds that the evidence provided by the plaintiff, including photos, video and witnesses, could not prove that the defendants had acted unlawfully. Thus the court rejected Wu's lawsuit.

Wu appealed and the appellate court, the Wenzhou Intermediate-Level Court (WILC), repealed the first court ruling in June 2001 and ordered a retrial. The original court retried the case and came to the same conclusion. It now ruled that the factory was a lawful building when it was first built in the 1970s. However, it noted that the factory was destroyed by a typhoon in 1994, Wu failed to apply for a new approval according to local planning regulations and also failed to register its ownership with the government. For these reasons, Wu was held to have acted unlawfully in rebuilding the factory in 1995.

Wu appealed again on three grounds. First, the court ignored the fact that the defendants neither gave Wu a chance for a redress nor issued a notice for compulsory enforcement before the demolition was carried out. Second, the court failed to make the defendants present the legal basis for their action and thus the demolition was illegal. Third, the factory was rebuilt before the local planning regulation was made, so this regulation could not be applied to the case. Finally, whether the new factory was registered or not was neither a factor determining whether the factory was legal or not, nor was it within the jurisdiction of the defendants.

In the end, the WILC tried the case and ruled that the defendants had breached the law and should compensate Wu 160,000 *yuan*. However, this amount was far lower than Wu's actual loss since the value of the machinery could not be accurately assessed. Moreover, since Wu has to date not yet receive a formal ruling from the appellant court, the enforcement has not been carried out.

A citizen who wins his case is often driven into a desperate situation. Wu Boliang was an innovative farmer in Nanfeng, Jiangxi, who was one of the first to get a government contract to use a plot for farming. After a dispute about the contract between Wu and the village government arose, he sued the latter and won the case in January 2001. The court ordered the village government to compensate Wu 640,000 *yuan*, but the latter refused to accept the court decision. Despite this, the court did not take any measures to enforce its decision. Since he received no compensation from the defendant, Wu fled to a mountain hideout in order to escape his debt collectors. When Wu appealed to the judge in charge of

enforcement, he was told that it could never be carried out because the village government had no money, and that Wu should not disturb him any more in future. This drove Wu into such despair that he even tried to commit suicide.<sup>52</sup>

The difficulties in the administrative litigation show the weakness of the law in protecting private rights against state infringement and in restricting governmental power. Thus the function of the ALL in constraining official arbitrariness has failed. Under the ALL, both litigant parties should have equal rights as with other types of litigation, but in practice the defendant is in a superior position. For example, if a legal representative of a company sues an administrative agency, the superior body of the company will strip him of his qualification for representing the company.<sup>53</sup> Even in judicial reviews, administrative agencies are more powerful than judicial agencies, so that the courts are unable to constrain them by using the ALL mechanism. The local Party and government interfere in administrative cases by making inquiries, giving instructions or even reviewing cases.

Thus powerful state agencies strongly resist judicial review and place their power above the law. Other supervision over this power, whether from the legislature or within the administrative hierarchy, is also weak. Moreover, China lacks powerful media or a robust civil society to monitor the officialdom. The weakness in judicial checks over Party and state power further results in the expansion of administrative arbitrariness and ignorance of individual rights. Traditional attitude towards the law in China also discourage citizens from taking legal actions against state agencies and makes them, especially the officials, unwilling or even ashamed to become involved in legal litigation.

Failing to curb public power and protect private rights, the PRC judiciary itself has not been immune from systematic corruption in state agencies. Before 1986, cases involving corruption were relatively rare in law enforcement agencies. Since then, an increasing number of officials from these agencies have been involved in either graft or profit-seeking activities.<sup>54</sup> Judicial corruption has become a major target of anti-corruption efforts in recent years. As Lü Xiaobo records, in 1996, corruption cases involving law enforcement personnel increased by 23% over the previous year. In the first ten months of 1997, there were 7,208 such cases, in which 1,303 involved middle or high-ranking officials in judicial agencies. In 1998, nearly 10,000 law enforcement agencies were investigated for involvement in business activities. As a result, 1,339 agencies were restructured and 2,270 senior officials were

---

<sup>52</sup> "Min gao guan, shen le you ruhe?" [A citizen sues an authority: what can you do even though you have won the case?], *Zhongguo qingnian bao*, 28 March 2001, p. 3.

<sup>53</sup> Peng Haipeng, "Tan quanli yinsu dui xingzheng susong zhi zhiyue jiqi duice" [On the constraints of power element on administrative litigation, and the solutions], *Xingzheng yu fa*, no. 3 (1998), p. 53.

<sup>54</sup> Lü Xiaobo, *Cadres and Corruption: the Organisational Evolution of the Chinese Communist Party* (Stanford: Stanford University Press, 2000), p. 197.



removed from their posts.<sup>55</sup> The figure of corrupt judicial personnel has been increasing to this day and the situation is difficult to control .

Corrupt judicial officials may extort money from litigant parties, leak information to one party or criminal suspect; they may accept bribery, gifts, or dinner invitations from litigants; they may handle cases without following legal procedures or refuse an open trial required by law; they may use their power to arrange lawyers who have good connections with them to represent a case, or meet with one party and his lawyer outside the court; a judge may place a lawyer who is a personal friend into a case which is already represented by other lawyers, claiming that the friend's speciality is needed in this case; judges may appropriate the money collected on behalf of their clients from enforcing court decisions. For example, three judges in Shenyang, Liaoning, among whom one was a vice-president of the district court and another was vice bench chief, and two judges in Hubei, lost millions of funds collected from enforcement in gambling.<sup>56</sup> The Anticorruption Bureau, which was established in the early 1990s to attack official misconduct, is itself not free from corruption. At its worst, the situation is out of control.

According to an SPC regulation, the president of local high level courts must take responsibility for lawbreakers in their jurisdiction by reporting their work to local Party committees and the People's Congresses or go all the way to the SPC if the case is major and influential. In 2000, 20 presidents from provincial higher level courts went to the SPC to undergo such examination, followed by self-criticism to the local authorities; at the same time, 32 senior court officials were dismissed from their posts and sentenced to life imprisonment. A total of 1,450 court personnel broke the law in this year, of which 1,377 were dealt with under the Party or administrative disciplinary rules and only 73 were punished by law.<sup>57</sup>

The current judicial reform has tried to improve personal quality through changing traditional channels for judge recruitment, enforce judicial decisions and improve adjudicating procedures. Xiao Yang admitted, after addressing problems such as emphasis of substantial justice while ignoring due procedures; too many pending cases each year affected court image and authority; local and departmental protectionism in hampering enforcing court decisions; many mistakes happened in judicial process due to lack of professional knowledge and practical ability among judges, that not all judges were conscientious in

---

<sup>55</sup> Lü Xiaobo, pp. 197-198.

<sup>56</sup> *Jiancha ribao*, 6 September 2002, p. 2. In China, the enforcement bench in the court carries out the enforcement of court judgements. The money obtained from the enforcement is directly transferred to the court account titled as enforcement account rather than to the other party, and then the court will transfer the money to the entitled party.

<sup>57</sup> SPC report, in *Law yearbook*, 2001, p. 31.

serving the people but were rude and arrogant; a minority of judges abused their adjudication power to forge legal documents in order to seek private interests, leading to many miscarriages of justice.<sup>58</sup> These problems remained in his 2002 working report.

The regime has launched a series of campaigns that focused specifically on the education and regulation of court personnel. The courts, later followed by all sectors, were required to improve their ethical standard and moral level, according to the Programme of Citizens' Ethical Construction.<sup>59</sup> Furthermore, regulations about judges' withdrawal from cases where they, their relatives, or friends are involved are also made by the SPC, and the Judges' Law was revised in 2001 accordingly. However, improvement of virtue alone cannot assure judicial fairness. Judicial corruption is a part of the institutional corruption arising from the political system and from the long-standing tradition as an authoritarian country. Corrupt judges are not different from those in other state agencies. The rule of law requires first an independent judiciary, free from Party and government interference, and then a culture of the rule of law among public servants and the citizenry. Only in this may judicial fairness be guaranteed and judicial corruption, together with the general political corruption, be restricted within a minimum level.

### 3. Conclusion

The PRC courts have very limited independence institutionally and individually, and are subject to a wide range of influences. The Party, through its PLC at all levels, ensures that its judicial policy and ideological tasks are carried out. At the same time, the judicial system is a hierarchy based on the democratic centralism of the Party and state, requiring lower courts and judges to obey their superiors. Thus local courts are subject to local Party Committees and governments and are often driven into protecting local interests or profit-seeking.

Party and government control over the judiciary has seriously undermined judicial fairness and efficiency. The fact that the regime frequently requires courts to carry out extra-judicial functions has hampered the process of judicial professionalism. There is no legal guarantee for independent adjudication since court personnel and financial matters are dependent on local authorities. It is not just poor quality or judicial corruption that undermines judicial independence. On the contrary, the lack of autonomy in the judiciary is the fundamental reason for the unfairness and corruption.

---

<sup>58</sup> The SPC report, pp. 31-32.

<sup>59</sup> In 2001, the SPC issued an opinion called "Guanyu jia da zhiben lidu, yufang he zhili sifa renyuan fubai xianxiang de yijian" [Opinions on increasing rectifying force in order to prevent and rectify judicial personnel from corruption], *Fazhi ribao*, 18 May 2001, p. 1.

The courts can only enforce the rule of law when the Party and state adopts, or yields to, a different philosophy of governance. The rule of law is an ideology requiring fundamental changes in the political system. As an eminent judge has pointed out, human rights depend largely on the judiciary and its power, and democracy and social justice call for vigilant watch by the judiciary, according to UN Basic Principles on the Independence of the Judiciary (the powers of the court must be independent and the appointment of judges and their tenure must also be independent).<sup>60</sup>

The rule of law requires a fair trial and due process for everyone, and when individual life and liberty are violated by the state and its officials or other political heavyweights, the courts must have the authority to intervene. Judicial independence and security of tenure are significant in maintaining social order. The misconduct of judges must be punished without affecting the fearless performance of judicial functions. At the same time, contempt of court and defiance of judicial orders should never be allowed. The administrative power should not have the power to remove judges. For judicial misconduct, there should be an independent institution to be empowered to investigate rather than handled by administrative agencies.

To date, China's judicial review of governmental actions is too limited to play a role in constraining Party and state power. As long as the Party leadership is superior to the law in practice, the judiciary and law will lack genuine independence whatever the regime claims. If the Party is truly committed to promoting the rule of law, it should not use the law as an instrument for fulfilling its changing political tasks; it should instead give the judiciary independence in solving conflicts and attaining social equilibrium. However, the focus of judicial reform on enhancing fairness and efficiency rather than independence and autonomy shows that the regime is reluctant to support judicial independence, for fear of undermining the Party leadership. Without autonomy, it is not clear how a fair, just, and efficient judiciary can be established. As one writer suggests, "the law should not serve any specific political agenda, be it class struggle or the construction of a socialist market economy....just educate the people about the importance of the rule of law. Do not put any demands on the courts and the lawyers to toe the prevailing political lines."<sup>61</sup>

---

<sup>60</sup> V R Krishna Iyer, "Judicial and Legal Reform: Redeeming the Judicial System: no Party Decisions Govern the State Process" (a paper presented at the *Fourth Consultation on Due Process in China*, held from 23 to 29 May 1999 in Bangkok, Thailand, which was organised by the Asian Legal Resource Centre of the Asian Human Rights Commission) (<http://www.google.com/search?q=Chinese+legal+reform&hl=en&start=80&sa=N>).

<sup>61</sup> Willy Wo-Lap Lam, *China after Deng Xiaoping: The Power Struggle in Beijing since Tiananmen* (Singapore: Chichester Wiley, 1995), p. 265.

## Chapter Six: An Official-based Legal Culture

It has been widely accepted that the rule of law assumes at least three important dimensions: a government of laws rather than men, a clearly defined legal procedural system to the protection of the citizen from abuse of state power, and a well-established and vivid legal culture to support the legal institutions and process.<sup>1</sup> Legal culture, which has evolved in a society over a long period, unlike that which is imposed from above, reveals the mentality and culture of this society in its attitude toward the law, and also decides the level of the rule of law. It is difficult to define a legal culture since it can include any cultural practice or value that affect people's attitude towards the law and legal institutions; it may refer to the values and expectations among officials and common people in relation to law.<sup>2</sup> Lawrence Friedman defines a legal culture as "those parts of general culture—customs, opinions, ways of doing and thinking—that bend social forces toward or away from the law and in particular ways."<sup>3</sup>

Generally speaking, legal culture, in a broad way, includes the legal system and legal consciousness among the officials and the people. In a specific way, legal consciousness generally relates to people's thoughts about the law and their evaluation of the law, and the legal institutions, which carry the values and standards relating to law that are common to the whole society. It is these common values and needs in a society that determine the way of thinking within which the legislative activity is carried out.<sup>4</sup>

Cultural elements have always played an important role during China's transformation to a modern society, and "in the Chinese context, the transformation of culture, or political culture, is often considered to be the key to the transformation of the society."<sup>5</sup> It is well known that a modern legal culture is very important to the establishment of the rule of law. To foster this culture, it requires at least three elements. First, there are well-defined laws for people to follow and there are fair and independent legal institutions through which laws are strictly enforced. Second, there is a widespread respect for the law

---

<sup>1</sup> For example, see Donald Barry (ed.), *Towards the "Rule of Law" in Russia? Political and Legal Reform in the Transition Period* (Armonk, New York: M. E. Sharpe, 1992), p. 199.

<sup>2</sup> Stanley Lubman, *Bird in A Cage*, 1999, p. 37.

<sup>3</sup> Lawrence M Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage: 1975), p. 15, quoted in Lubman, 1999, p. 37. For Friedman's further discussion of legal culture, see his article, "The Concept of Legal Cultures: A Reply", in David Nelken (ed.), *Comparing Legal Cultures* (Brookfield, VT.: Dartmouth, 1997), pp. 33-39.

<sup>4</sup> Li Rui, "Shi lun zhongguo falü wenhua" [A tentative discussion of Chinese legal culture], *Jinan daxue xuebao*, no. 4 (1999), p. 63.



and the judiciary, and both state agencies and people abide by laws. Third, there is a well-developed consciousness of rights and freedoms so that state agencies and officials can be restricted from infringing individual rights and interests. These elements being in place, individuals and companies can trust in law and the courts to resolve disputes and safeguard their rights.

China's legal culture carries strong influences from its imperial tradition and the PRC's early practice, which are both formed in a similar social environment--on a highly centralised economic and political system. After the PRC was founded in 1949, the highly centralised economy and one-Party rule provided a consistent social environment in favour of the traditional culture of the rule of man. The reform, which started in the late 1970s, focused on economic modernisation, and reforms in cultural and political tradition were not the priority for the Party-state. The government plan for legal reform that has taken place is to ensure two Party priorities: economic performance and social stability. This process involves introducing a great number of Western legal concepts and rules. However, the influence of Western legal culture is limited and adoption is fragmentary with the rejection of a totally Western version of the rule of law.

Although the development of a legal system has been going on for over twenty years, there is still not a legal environment for implementing the rule of law in China. The resistance to law enforcement is strong and powerful. Party and governmental power are in fact superior to the law and the judiciary, and even the courts have failed to fulfil their professional goals in realising social justice. Legal awareness among the whole society, especially among state officials, including judicial personnel, remains poor. Worship of political power is embedded in China's traditional culture, and has profound influence on the mentality, thoughts and assumptions of the officials and its people. This power is always considered to be the highest authority while the law and the courts are less important, as are lawyers, who have no official identity.

Thus the elements needed to foster a modern legal culture remain at an early stage in development. Transforming thought and culture is the hardest task among all obstacles facing the implementation of China's rule of law and this project will take a long time. Moreover, the obstacles discussed in previous chapters will increase the difficulty and complexity in nurturing a culture of legality in contemporary China.

---

<sup>5</sup> Shiping Hua (ed.), *Chinese Political Culture: 1989-2000* (Armonk, New York: M. E. Sharpe, 2001), p. 3.

## 1. Legal tradition based on the rule of man

Tradition and culture play a great role in shaping the spirit of a nation, and people always pay a great respect for their traditional customs and values.<sup>6</sup> For the greater part of its two-millennial history, China has gradually developed its own law-related institutions and culture, including approaches to legal problems, which are usually referred to as Chinese Legal Traditions [*zhonghua faxi*, 中华法系].<sup>7</sup> These traditions have exerted a strong influence on China's political and social life and have been integrated to Chinese culture and mentality. Over the long imperial history, Confucianism is the underlying and dominant principle of China's political and social institutions. At the same time, Legalism has also become a supplement to Confucian principles. As MacCormack points out, traditional Chinese law is Confucian in spirit and Legalist in form.<sup>8</sup>

Confucians believe in the fundamental goodness of men, advocating rule by moral persuasion in accordance with the concept of *li* [礼, propriety, a set of generally accepted social values or norms of behaviour]. *Li* is enforced by society rather than by courts. Education is considered to be the key ingredient for maintaining social order, and codes of law are intended only to supplement *li* rather than play their independent role. *Li* is persuasive and thus the instrument of a virtuous government, while laws are compulsive and the instrument of a tyrannical government. Laws are not better than the men who create and execute them, while the moral training of the ruler and his officials count for more than a well-designed legal system. Therefore, the imperial codes focus on the maintenance of the inequality on which social status and class have been based, the differentiation of the senior and junior, and on the strengthening of the clan system.<sup>9</sup> Hence, "*li* does not extend down to the common people, and *xing* [刑, punishment] does not extend up to the officialdom."<sup>10</sup>

---

<sup>6</sup> Robin Vitaly, "Confucius and Early Confucianism", in Steven Levine (trans.), *Individual and State in Ancient China: Essays on Four Chinese Philosophies* (New York: Columbia University Press, 1976), pp. 10-11.

<sup>7</sup> Zhang Jingfan, *Zhongguo falü shi lun* [On the history of Chinese law] (Beijing: Falü chubanshe, 1982), p. 11.

<sup>8</sup> Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* (Athens: University of Georgia Press, 1996), p. 1.

<sup>9</sup> During writing the part of imperial Chinese legal tradition, I have mainly consulted the following books: Geoffrey MacCormack, *Traditional Chinese Penal Law* (Edinburgh: Edinburgh University Press, 1990) and his another book, *The Spirit of Traditional Chinese Law* (Athens: University of Georgia Press, 1996); Derk Bodde & Clarence Morris, *Law in Imperial China* (Philadelphia: University of Pennsylvania Press, 1973); Philip Huang, *Civil Justice in China: Representation and Practice in the Qing* (Stanford: Stanford University Press, 1996); and Ch'u T'ung-tsu, *Law and Society in Traditional China* (Paris: Mouton, 1961).

<sup>10</sup> MacCormack, *Traditional Chinese Penal Law*, p. 32.

On the other hand, Confucian scholars and rulers accepted that teaching and moral guidance alone would not suffice to secure good behaviour among the people. Penal laws, while necessary, should principally be used to supplement and reinforce the moral values held by the ruling elite, and to some extent, by the population at large<sup>11</sup>. Law and punishment were considered the secondary means of maintaining social tranquillity. They further argued that *li* is preventive in that it turns the individual away from evil before he has the chance of committing a crime; whereas law is punitive in that it only comes into action to punish the wrongdoer. "If the people are guided by *fā* [法, law], and order among them is enforced by means of punishment, they will try to evade punishment, but have no sense of shame, but if they are guided by virtue, and order among them is enforced by *li*, they will have a sense of shame and also be reformed."<sup>12</sup>

In contrast, the Legalist tradition insists that a society can achieve harmony only when transgressions are met with firm and swift punishments. It emphasises state power and control rather than morality as the effective means to rule the state and the people. Only laws that are clearly written and able to be vigorously enforced may curb social disruption and crime. In the Legalist view, the object of law is deterrence, preventing offences through intimidation. They advocate an authoritarian government in which law is an instrument for the ruler to uphold his supremacy over his subjects by applying this equally to both officials and commoners.

To sum up, the imperial legal system has the following characteristics:<sup>13</sup>

(1) Unequal treatment of individuals according to their social status

The law gave formal recognition to the social inequality, which in other ways separated the vast commoners from the small and highly educated group of officials and Confucian scholars. The nobles and officials were often immune from the jurisdiction of the legal system. The judicial authorities do not have much power over these groups when they committed crimes. The courts and law are mainly intended to deal with commoners.

First, the emperor was supreme over all classes, with the power of law-making and final judgement of the offender. Second, the penal codes acknowledged entire categories of

---

<sup>11</sup> Maccormack, *The Spirit of Traditional Chinese Law*, p. 7.

<sup>12</sup> Liu Binnan (annot.), *Lunyu zhengyi* [The annotation of the *Analects*], in Wang Yunwu (edi.), *Guoxue jiben congshu sibaizhong* (Taibei: Shangwu yinshuguan, 1969), II, p. 28.

<sup>13</sup> Literatures regarding China's imperial legal tradition are many, and the following summary is mainly based on the works by MacCormack, Bodde and Morris, Ch'u T'ung-tsu (see note 9), and Philip Chen (*Law and justice: The Legal system in China 2400 B.C. to 1960 A.C.*, New York: Dunellen, 1973)

persons, who are qualified under the "eight conditions for consideration" [*ba yi*, 八议]<sup>14</sup>, as a special privileged class to deserve special judicial procedures and treatment as compared to the great majority of commoners. This particular class included members of the imperial family, descendants of former imperial families, members of government officials and their immediate relatives. It is this class especially that was expected to model its behaviour according to the *li*.

People in these categories could not be arrested, investigated or tortured without the permission of the emperor. The courts must first report the case to the emperor to decide matters of arrest, punishment and execution.<sup>15</sup> The emperor often considered reducing their punishment to fines, reduction in official rank, or dismissal from the post. Punishment applied to common people was not used to this social group because for such persons the disgrace and shame entailed by their committing an offence or if they were dismissed from post has been regarded as severe enough.

## (2) The combination of judicial and administrative powers

The administration of law was based on a centralised system and not separated from the imperial administrative system. The government at all levels plays both administrative and judicial affairs, and thus the magistrates were also detectives, prosecutors and judges. Legislative, judicial and administrative powers were highly concentrated on the hands of the emperor. Officials at all levels could not make laws but only follow imperial laws and decrees. Local officials often made their judgements on Confucian classics rather than the penal code, allowing arbitrary interpretation and flexibility.<sup>16</sup> In order to avoid injustice at this lower level, imperial China adopts a well-defined appeal system for almost all cases to go all the way to higher levels for final review or even to the emperor himself.

---

<sup>14</sup> "Ba yi", which originated in the Zhou *li* [Rites of the Zhou dynasty], first entered the law of the Wei dynasty (220-265), and has remained in all subsequent codes. It includes: (1) those who were the relatives of the sovereign; (2) those who were old friends of the sovereign; (3) those who were of great virtue; (4) those who were of great ability; (5) those who were meritorious; (6) those who were high officials; (7) those who were exceptionally zealous of government duties; (8) those who were the guests of the sovereign: descendants of the preceding imperial families. It was a law in the Han dynasty that when nobles and officials from certain ranks were guilty, special permission had to be requested from the emperor before they were arrested or even investigated. Both Ming and Qing codes legalised this special privilege for those who qualified under the "eight conditions for consideration".

<sup>15</sup> *Ming Code*, vol. I, 6a; *Qing Code*, vol. 4, 25a, in Bodde & Morris, p. 35.

<sup>16</sup> The magistrate was commonly assisted in his judicial work by a legal secretary who did possess specialised knowledge of the law, and who, on behalf of the magistrate, could prepare cases for trial, suggest appropriate sentences, or write the legal reports for the higher governmental authorities. Yet he was merely a personal employee of the magistrate, who paid his salary out of his own private purse. Hence the legal secretary was not permitted to try cases himself or even to be present at the trials. See Bodde & Morris, p. 113.



The preference for moral education to formal law also discourages any professional developments in judicial work and legal profession. The distrust and disrespect of the legal profession is a remarkable feature of the traditional Chinese legal culture. Private legal specialists were regarded as troublemakers and "litigation tricksters" or "pettifoggers" [*song gun*, 讼棍] through fomenting litigation and bringing false accusations. Their activity was regarded illegal and thus should be punished under the imperial law.

Corruption, irregularity and cruelty were full of the administration of justice in imperial period.<sup>17</sup> There was not an adversarial system for an individual to defend himself and he had to give his fate at the mercy of authority. Torture for extracting confession was imperial judicial procedure and a person was often jailed a long term before the trial. The law is designed to protect the state from the people rather than the people from the state.<sup>18</sup> As a result, this law is primarily a "code of punishments,"<sup>19</sup> or it should be regarded as "administrative regulations"<sup>20</sup>.

### (3) The domination of penal law and the poor development of rights

Since the major function of the imperial legal system was to punish crime and maintain social order, civil and economic cases were normally settled through informal means outside the courts. People were reluctant to go to court in fear of losing face, reputation or good relationship, and they prefer settling disputes out of court through mediation conducted by a third "prestigious" party comes from the local gentry and usually a great of pressure on parties involved in the process and Confucian values were taught. The other reason that people do not like litigation is that the dispute settlement is totally controlled by the magistrate without considering their own will. In practice, law does not reach down below the county government in which social groups, such as villages, clans, families and other units play a significant role in settling disputes.

Therefore, the legal system is relatively insignificant in people's life.<sup>21</sup> In civil cases such as property rights and inheritance, the imperial officials either refer these cases back to the village for local mediation or persuade the parties to make concessions and resolve the dispute amicably. As Philip Chen says, the law plays only a secondary role in defending

---

<sup>17</sup> Philip Chen, *Law and justice: The Legal System in China: 2400 B.C. to 1960 A.D* (New York: Dunellen, 1973), p. 8.

<sup>18</sup> *Ibid*, pp. 9-10.

<sup>19</sup> MacCormack, *The Spirit of Traditional Chinese Law*, p. 27.

<sup>20</sup> *Ibid*, p. 49.

<sup>21</sup> However, Philip Huang has challenged this argument, claiming that the *Da Qing Lüli* (Qing code) contains quite a lot of rules on civil law and that it was common for magistrates to deal with civil cases. See his book, *Civil Justice in China: Representation and Practice in the Qing* (Stanford: Stanford University Press, 1996).

individual rights, especially his economic rights, and if this right was infringed by the government or the state, the law had no remedy at all.<sup>22</sup>

#### (4) Consolidating family values and collective interests

The family values were regarded as fundamental to a stable imperial social order. The imperial law fully recognised the parents' authority to control their children, seniors to the juniors, and husbands to wives. Children had no independent right to have their own property, to live separately from their parents, or even to choose their spouses. Thus disputes between family members are always judged according to an individual's status in the family or clan. Based on basic family values, an individual should be first subject to the interests of his family or clan and then to the community, eventually to the state. The emphasis was more on individual responsibility than rights, more on duty than freedom and more on righteousness than pursuing profits.

From above summary, one may be impressive of the moralisation of imperial politics and law, and of the instrumental use of law as a supplement to moral values. To date, the ordinary people in China still find it difficult to distinguish moral problems from legal ones. Law is still not elevated to a high, if not supreme, degree to regulate and constrain both public and private activities. Instead, law is still used as a means together with many other means to govern the state and the public. The emphasis of family and collective values is also, in some extent, discouraging individual development. The low professional level in the courts and no separation between the administrative and judiciary are also having a deep impact on the legal system in contemporary China, so are legal profession and dispute settlement. This legal tradition, in many Western observers' view, is fundamentally incompatible with the requirements of the rule of law.<sup>23</sup> There is hardly any similarity between Western legal tradition, on which the rule of law is originated, and China's legal tradition, because the former mainly emphasises protecting individual rights and curbing bureaucratic power, an independent and accountable judiciary, and an autonomous legal profession.<sup>24</sup>

---

<sup>22</sup> Philip Chen, p. 11.

<sup>23</sup> Western academics on modernisation theory and political culture agree "the weight of this comparative critical analysis might suggest that there are more liabilities than assets in China's legal tradition." See Ronald C. Keith, *China's Struggle for the Rule of Law* (New York: St. Martin's Press, 1994), P. 53.

<sup>24</sup> Lubman made a detail comparison between Western and Chinese legal culture, 1999, pp. 13-32.

## 2. Legal Culture in Contemporary China

China's traditional legal culture has a profound impact on the attitude and mentality of administrators and ordinary people towards law and legal institutions. It has hardly changed throughout all the revolutions and successive political campaigns that have happened in the twentieth century. In China today, this legal culture itself is subject to reform. The incomplete and ineffective conditions in the PRC legal system also contribute to the lack of legal awareness. Moreover, continuous totalitarian rule hampers the development of a modern legal culture.

The credibility and accountability of law determine the extent to which the society will obey the law. This first requires that legislative activity be a democratic and rational process in which legal notions should be well defined, predictable and enforceable; and secondly it requires that legal principles fulfil social justice and be applied equally to all subjects, and that laws must reflect the intention of safeguarding individual rights and restricting official power.

During the period of reform, the lawless situation that existed during the Cultural Revolution has been basically changed. However, the approach towards legal reform results in frequent use of law as an instrument, viewing "objective reality" as the source of law but only the CCP has the authority to decide what "reality" is according to its own needs and ends.<sup>25</sup> This principle is consistent with the Party mass line and working style, which stresses seeking the truth from facts and requires adapting policy to actual conditions. As a result, the law changes frequently, officials find ample space to distort laws and the public find it hard to trust in law. Although instability in the law may be an acceptable cost during times of reform, inconsistency and uncertainty in the law will introduce illegal constraints into economic development. If economic reforms continue without the help of law, the law will also lose its relevance to society and its legitimacy.<sup>26</sup>

Since administrative fiats are still more important than statutory laws in practice, which shows the deep-rooted culture of the rule of man, legal transplanting is also an instrumental process through selecting fragmentary foreign rules without accepting the rule of law as a whole. Moreover, it takes a long time for new laws to penetrate into the life and way of thinking among the public. Without a culturally favourable environment, these laws

---

<sup>25</sup> Yu Xingzhong, Legal Pragmatism in the People's Republic of China, *Journal of Chinese Law*, no. 3 (1989), p. 50.

<sup>26</sup> Ronald Keith, *China's Struggle Towards the Rule of Law*, 1994, p. 25.

cannot take root in the new soil, leaving the rule of law more a slogan than a practice as China moves into the twenty-first century.<sup>27</sup>

A modern legal culture needs a favourable environment for the enacted laws to be strictly enforced and for society to obey voluntarily these laws. Respecting the law and obeying the law are two basic dimensions for the fostering of a rule of law culture. Respect for law requires "developing a conscious appreciation of the law", while obeying the law stresses applying this consciousness to "appropriate social behaviour."<sup>28</sup> It requires law's supremacy over state power and individual officials' obedience to the law.

The actual situation in China is that the Party is above the law, and administrative power is superior to the law and the judiciary. Thus major obstacles or difficulties in establishing the rule of law lie in abuses of public power and its arbitrary infringement on private rights. If governmental power cannot be constrained, laws and regulations will become useless and rulers will set themselves above the law by trespassing private rights and market freedoms. Without effective supervision and punishment, the network of political power, developed over many years, is often a formidable influence in organised crime and corruption.

Compared to the legal illiteracy [*famang*, 法盲] among the people, the lack of legal consciousness among officialdom poses a more severe threat to the fostering of a culture of the rule of law. An official-based culture [*guanbenwei*, 官本位] favours the political power and rule of men. It is those in power who determine the legal environment. Officials frequently replace the law with their own words and notes, break laws and even commit crimes. An investigation into the enforcement of the ALL, which was conducted in the early 1990s, revealed that only 38.5% of officials knew citizens' constitutional rights, 11.5% never learned the constitution, 25.6% knew less than half of these rights, and only 16.5% knew all of them. Many officials considered that the ALL "tied their feet and hands and affect work efficiency".<sup>29</sup>

One example of poor legal consciousness among Chinese state officials is the so-called "political performance projects" or "image projects" [*zhengji gongcheng* or *xingxiang gongcheng*, 政绩工程或形象工程] that aim to show their political merit. Many of these projects were illegal. For example, the Hubei provincial government decided in 1995 to develop a luxurious residential area named "bund garden" [*waitan huayuan*, 外滩花园] in

---

<sup>27</sup> Qiang Shigong, "Falü yizhi, gonggong lingyu he hefaxin" [Law Transplant, Public Domains and Legitimacy], *Guo fa wang* ([www.lawcn.com/classic/classic0001.htm](http://www.lawcn.com/classic/classic0001.htm)).

<sup>28</sup> Ronald Keith, 1994, p. 17.

<sup>29</sup> Gong Xiangrui, *Fazhi de lixiang yu xianshi* [The ideal of the rule of law and the reality] (Beijing: Zhongguo zhengfa daxue chubanshe, 1993), p. 26-27.



its capital city, Wuhan, for a cost of nearly 0.2 billion *yuan*. The Flood Prevention Law was passed in August 1997 and enforced in January 1998. The law stipulates that any buildings which would hamper the passage of floodwater within the area of rivers and lakes must be prohibited. The Hubei provincial administration still mobilised all resources to carry out this illegal project, and they did not stop it at once even after they were informed of the law. The newly-built luxurious blocks of flat had eventually to be dynamited because they were right in the flood-prevention zone.<sup>30</sup>

Officials in Nanjing planned to build a sightseeing platform on the hill of Zijinshan, on which a building of historical heritage, the famous Zhijingshan Astronomical Observatory, stands. The project was still carried out regardless of the state laws for the preservation of historic heritages, and the platform finally had to be demolished, causing tremendous loss to the state. It was reported in the *Economic Reference News* that officials in Jiujiang, Jiangxi, invested nearly 10 million in building an airport but only received 100 passengers during the course of a whole year. Another such airport was built in Wuhu, Anhui, with an annual profit of only 6,000 to 7,000 *yuan*.<sup>31</sup> Many other officials from poor areas also launched many image projects irrespective of the tight budget and low living standards of the people in their jurisdictions. Examples of these projects are too many to list.

In these cases, the officials either have full knowledge of their illegal decisions or arbitrarily carry out these projects without assessing the consequences of their decisions. It reveals the habit of rule of man in which officials have been used to making their decisions according to their own wishes rather than adhering to the law. They used law only to curb the people, not their behaviour. This ignorance of law among state agencies and administrators has not only caused great damage to state interests but also to the authority of law. This is the great cost resulting from a society based on the rule of man.<sup>32</sup> The greatest constraint and threat to the rule of law are the replacement of public power with private purpose, the infringement of public power on private rights, and the difficulty in controlling such abuses. If officials do not set examples themselves in exercising administrative powers on a legal basis, legal awareness in the whole society will be impossible to foster.

The ineffectiveness in controlling governmental power means the malfunction of the rules, resulting in those in power being superior to the law. These powerful forces step in market competition and develop complicated powerful networks which cause group

---

<sup>30</sup> Liu Jingyou, "Jian lun chengxu bi shiti geng zhongyao" [A brief discussion: the procedure is more important than the substance], *Legal Daily*, 17 February 2002, p. 3; Zhou Fenmian, "Yi fa xingzheng qi neng zhishi kongtan" [How could the exercising administrative power according to law turn out to be hollow words], *Legal Daily*, 3 February 2002, p. 2.

<sup>31</sup> Ibid.

<sup>32</sup> See *Fazhi ribao*, 4 February 2002, p. 1.

corruption and also make it difficult to detect their misconduct. Many projects, including “fishing projects” [*diaoyu gongcheng*, 钓鱼工程], attract investment and commercial bids while not returning investment after local governments obtain the money, using vague regulations to make things difficult for investors.<sup>33</sup>

The direct reason for causing widespread administrative interference and lack of judicial independence is firstly worship for rule of man and good officials. Second, moral weakness is over all kinds of life and workplaces, leading social credit declined. Third, poor legal consciousness results in widespread use of extra-legal means such as official power, money and social connections, which has deep influence from legal tradition. When social disputes can be resolved in a much easier and efficient way through exercising official power than legal remedy, what is the driving force for establishing a rule-of-law state? In this legal environment, how can one rein in judicial corruption and intense resistance of law enforcement? Thus, rule of law requires multiple efforts to transform China’s culture, way of thinking, political culture, and legal tradition. Finally, the deep fondness and high expectations for virtuous officials often surpass the faith in the law while ignoring the construction of rule of law.<sup>34</sup>

Poor legal awareness among Chinese officialdom is also manifested in the worship of official power and lack of respect for law. The historical concept of official-based idea or mind has been discussed frequently in China because of its link to political corruption and culture. This idea or mentality is explained as viewing an official post as the basis of everything in a person's life. To get an official post is considered to be the highest goal. A person's value, position and role are all assessed in terms of whether he is an official and how senior his rank is. In practice, this culture results in the phenomenon of pursuing or requesting an official post, selling and buying an official post, and other forms of bureaucratic practices. These are closely related to the long-standing centralised and unitary administrative system.<sup>35</sup>

In contemporary China, holding an official post is still regarded as a source of wealth and privilege. Although the economy has developed greatly, it is still early for an independent business class to have grown up, which is often considered to be the main counter force against state bureaucracy. On the contrary, managers depend to a great extent

---

<sup>33</sup> Qian Hongdao, “Fazhi de jiannan” [The difficulties of the rule of law], *Cankao wenxuan* (Beijing) [Selected articles for reference], no. 24 (2001), pp. 7-8.

<sup>34</sup> For a similar accounts of current legal culture, see Zhan Meibai, “Lun shangfa jingshen” [On spirit of respect for law], *Fazhi yu shehui fazhan*, no. 3 (1999), pp. 88-91.

<sup>35</sup> Zhang Xiaolin, “‘Guanbenwei’ yisi jiexi” [The explanation of the ‘official-based concept’], *Renmin ribao*, 17 January 2002, p. 9; Also see Liu Zhanfeng, “Haishi ‘guanbenwei’ zai zuosui: gaijing dang

on the state for investment and other support. At the local level, SOE managers are usually officials appointed by the government, and local private businesses have to maintain a close relationship with local authorities in order to survive. Thus, official posts or official connections are crucial in economic development and people's lives, making pursuit of an official post greatly attractive.

The importance of seeking an official career has a long tradition. In many areas, the selling and buying of official posts has become a business by corrupt officials in contemporary China. For example, in 1997, the Organisation Bureau of Pingyang county, in Wenzhou, Zhejiang, made over 300,000 *yuan* through selling official posts within its jurisdiction. In the same year, a vice-mayor in Anyang, Henan, sold 18 official posts.<sup>36</sup> In a typical case in Shaoguan, Guangdong, an individual businessman [*ge ti hu*, 个体户] was rocketed to the position of an important official. He paid 430,000 *yuan* to go through the process from joining the Party, entering into the Party cadres system, as a lower rank official, to finally becoming the Secretary of a district Political-Legal Commission, in one month.<sup>37</sup>

In order to deal with this misconduct, the CCDI and the Ministry of Central Organisation issued a notice to call for preventing and investigating illegal practice in the selection and promotion of Party and governmental cadres. Wang Huilin, a Party secretary in Changzhi, Shanxi, restructured and approved 432 official posts, and quickly promoted 278, during the two months before his retirement. In Ningxia, from 1991 to 1998, three consecutive Party Secretaries in Tongxin county, Ma Yong, Ding Lin, and Shang Jingyu, received money for appointing 357 cadres, of which 140 personnel were assigned using forged identities and official seals, and one was even a student of a secondary school, who was appointed as a cadre in charge of birth planning, and collected his salary. Those corruption cases which involved the selling of official posts are only the tip of an iceberg.<sup>38</sup>

Soon after gaining an official post by the means of bribery, these people start to use their power in pursuing personal gains. At each level, Party and governmental officials have usually formed a complicated web in which the whole officialdom is connected, sharing honour or disgrace [*rong ru yu gong*, 荣辱与共]. This group often excessively protects its own interests and benefits within the area of its jurisdiction while distorting state laws and

---

de zuofeng xilie tan zhiwu" [It is still the 'official-based' idea that makes mischief: part five of series of articles on improving Party working style], *Renmin ribao*, 3 April 2001, p. 9.

<sup>36</sup> He Qinglian, *Xiandaihua de xianjing: dangdai Zhongguo de jingji shehui wenti* [The trap of modernisation: economic and social problems in contemporary China], Beijing: Jinri Zhongguo chubanshe, 1998, pp. 343-344.

<sup>37</sup> Ling Zhijun and Ma Licheng, *Huhan: Dangdai Zhongguo de wuzhong shengyin* [Holler: Five voices in contemporary China] (guangzhou: guangzhou chubanshe, 1998), p. 345.

<sup>38</sup> Liu Haiqi, "Mai guan yu jue, fa bu rong" [Law does not allow the selling of official posts], *Fazhi ribao*, 4 June 2001, p. 1.

central policies.<sup>39</sup> Such powerful official circles can damage any well-established legal system, not to mention a limited one. In some regions, local authorities operate in this way and even cover up organised crime.

Seeking an official position is thus attractive and profitable. In China, administrative power is ever expanding with no effective restriction from either the law or the regime. The lack of control over this power allows of a wide range of privileges and powers used at the discretion of state officials. The phenomenon of pursuing private gains through public office is rampant and is endangering current Party rule. In the process of the marketisation of the public ownership system, individual officials and their designated entrepreneurs have taken control of local businesses, leading to the development of an authoritarian economy. In this trend, the market economy is becoming a governmental market economy in which official power plays an important role. It is estimated that during 20 years of economic reform, the expansion of China's political capital that closely related to political and administrative power has brought the very few people in power a profit of more than 30,000 billion *yuan*.<sup>40</sup>

Although campaigns against the corruption of officials have been launched regularly and many officials, including some senior ones, have been punished, the situation has not been controlled and is deteriorating as more senior officials become involved. Enthusiasm for attaining an official post is still high, because the cost of breaking the law is low as compared to the vast profits to be obtained from corruption. Punishment for the misconduct of officials is insufficient, since they are often dealt with by Party discipline or administrative rules and hardly punished by law. In serious cases involving circumstances that would have great social consequences, the courts are instructed to try these cases according to decisions made by the Party. The purpose of this procedure is to warn other officials, to conceal the working of the bureaucratic system and to appease the people. Sometimes, these accused officials are made scapegoats in order to cover up a power struggle. The weakness of the constitution and judiciary in effectively restricting official abuses encourages cadres to escape from legal punishment when they break the law, and increases the interdependence between lower level officials and higher-level ones.

As He Qinglian states, the current efforts in perfecting the legal system do not touch or probe into the historical and cultural bases of the rule of man [and there is the absence of institutional separation and restriction of state power], so reform will not necessarily lead China to the rule of law. A legal culture has the potential to encourage the observance and enforcement of the law. However, according to her, the wide ignorance of law and abuses of

---

<sup>39</sup> Zhong Guoxin, *Zhongguo gaige bao* [China's reform news], 19 August 1998, p. 6.

<sup>40</sup> Ling Zhijun and Ma Licheng, p. 347.



power in the whole bureaucracy have seriously undermined the emergence of a modern legal culture. People's indifference to and distrust of the law has counteracted the hope that the growth of a legal consciousness would develop. Creating this awareness of law necessarily involves bringing citizens into the process of making law and building legal institutions that can be relied upon. These are important components in transforming a society ruled by man into one ruled by law.<sup>41</sup>

As with state officials, ordinary people are also influenced by traditional images of the courts and law. Administrative power rather than the law is regarded as the most important means of getting things done. Moreover, PRC officials have set bad examples for society. There is still a widespread belief in China that officials are more powerful than the law, and that the courts must also obey the Party and the government. The people believe that there is no difference between the PSB, courts, and prosecutors and that lawyers also must obey the three agencies or they will be suppressed. People regard the law as a means of dealing with those who have no official connections, while powerful parties are not substantially affected by it. In most cases, governmental agencies and officials protect each other against civilians, leading to the parties who have followed all the legal rules being wrongly sentenced. In practice, the lack of judicial independence and efficiency in dispute settlement and rampant judicial corruption have also turned people away from the law.

The popularity of expecting "clear-sky officials" [*qingtian*, 青天], refers to clean and upright officials in China's legal culture reflects a deep-rooted favour for the traditional rule of man. Films and plays adapted from traditional stories about virtuous officials still appeal to the public at this time. Peasants are still in fear of the government and those who are in power, and look forward to upright and powerful officials occasionally turning up to maintain justice and be concerned about the people's welfare. At the same time, citizens show their suspicion of the good rule of man, regarding a good legal system as a necessary supplement only.<sup>42</sup> This wish for clean officials may undermine the current effort to establish the rule of law. The role of such "clear sky" officials to help legal reform is limited in that the personal authority of such officials is superior to that of law since there is no separation between the judiciary and administrative power. Literature and plays about clear sky officials concern accounts of the rule of law which show that the law is weak, while the officials are powerful since they can arbitrarily interfere in a case. It seems to Chinese people, especially

---

<sup>41</sup> See Liu Xin, "Renzhi yu shehuizhuyi fazhi buneng xiang jiehe" [It is impossible for the rule of man to be united with socialist rule of law] in Zhang Jin (ed.), *Fazhi yu renzhi wenti taolun ji* [Collected papers on the rule of law and the rule of man] (Beijing: Qunzong chubanshe, 1981), p. 88.

<sup>42</sup> Zhang Shuming, *Zhongguo 'zhengzhi ren': Zhongguo gongmin zhengzhi suzhi diaocha baogao* [China's 'political men': report of investigation on political quality of Chinese citizens] (Beijing: Zhongguo shehui kexue chubanshe, 1994), pp. 51-52.

peasants, that law is useless without good officials to enforce it. It is the rule of man and the worship of power that cause administrative interference in the independence of the judiciary. With the tradition of combining administrative and judicial power, it is easier or more effective to use power to resolve social conflicts than to use the legal system. In this situation, we can say that it is definitely not the case that its goal of the rule of law has been reached.

In rural areas, there has been a wide restoration of clan or kinship tradition, as well as temples or other types of superstition. Clans are controlling the countryside in some areas. They encourage farmers to safeguard clan interests against any external infringement including that from the implementation of state laws and court decisions. Instead, the use of old clan rules to regulate rural affairs and even the exercise of judicial power to detain and punish those who breached these rules are very common in recent times. The revival of the clan organisations is an obstacle to modernisation and the rule of law. If the clan system returned throughout the rural areas, the rule of law will meet resistance from over 80% of the population. This will also indicate that, on the one hand, the state has failed to protect farmers' interests from various infringements against them, and on the other hand, state policy and law have failed to get through in vast rural areas. At the same time, clans are utilised as a tool of extortion against farmers and in committing organised crimes in contemporary China, in which many local officials are involved.

Certainly the Party-state has realised the severity of this situation. In 2002, Wen Jiabao, who was then vice Prime Minister in charge of rural work, said that in 2001, with the exception of the countryside around Shanghai, Beijing, and in Jiangsu and Tibet, all the rest of the rural areas had witnessed over 7,000 conflicts between peasants and local administrations. He said that Party policy had failed to be implemented in rural areas, and widespread uprising has brewed there. He attributed the main responsibility to Party and government officials for their ignorance of the suffering of peasants due to excessive taxes and fees imposed by local authorities, and for their tolerance of local black and evil forces manipulating and oppressing peasants. Many rural governments had not been functioning for a long time and some of them had even participated in anti-government activities.<sup>43</sup> In 2001, nearly eight million peasants took part in these anti-local government actions, resulting in the death or injury of around fifteen thousand people.<sup>44</sup>

In China's legal culture, the judicial process is not designed to encourage the litigant parties to be active and aggressive in the trial, but to ensure the judges' control in the trial.

---

<sup>43</sup> Wen Jiabao, "Quanguo nongchun shehui fazhan qingkuang" [The national situation of social developments in rural areas], given at the Conference of the Central Committee on Rural Work held on 7 January 2002. *Zhengmin* [Debate and contention] (Hong Kong: Baijia chubanshe), no. 252 (January 2002), pp. 9-11.

This state-dominated justice accounts for many irregular judicial practices, such as the small number of witnesses, the use of torture in extracting confessions and the misunderstanding of the role of lawyers.

Witness evidence is not very important in practice, and it is the fact of substantial justice, not formal or procedural justice, that is valued. For example, the right to silence in the criminal process is a totally new concept, confusing many people because they do not understand why it is necessary to inform a suspect of his right to silence since he has possibly committed a crime. They think that whether there has been a crime or not is a matter of fact; it is not decided by the court failing to follow certain procedures. People could find it difficult to understand a suspect being set free as a result of police failing to inform him of the right to silence. Moreover, the method for proving a crime also reveals a traditional emphasis on substance. The law generally requires clear facts and sufficient evidence in deciding a crime irrespective of any reasonable doubts that still exist in the case.

The use of torture for extracting confessions has been criticised both at home and abroad, but it is difficult to stop this practice. In spite of the legal prohibition against torture, law enforcement officials are reluctant, in certain cases, to give up using torture to make suspects confess. Ordinary people ignore this as long as it does not have anything to do with them. Many people think that the legal procedures eventually serve substantive justice. Once the suspects are proven guilty, the use of torture for extracting confessions will be ignored.

Western legal cultures take individual freedom and rights very seriously, and the major purpose of their criminal justice systems is to protect the right and freedom of the individual rather than those of society as a whole. The emphasis is more on setting an innocent person free, through safeguarding procedural justice, than on preventing a suspect escaping from punishment through focusing on substantive justice. In contrast, Chinese culture particularly emphasises collective, social and public interests more than individual interests. A major purpose of its criminal system is to maintain social order rather than to safeguard individual freedom. It focuses more on attacking the crime than on protecting individuals. Rather than emphasise preventing a person from being wrongly sentenced, the Chinese system emphasises preventing a potential criminal from escaping punishment.

The outcome of the Simpson case in the United States will never be accepted in China.<sup>45</sup> When Professor Alan Dershowitz (from Harvard University), one of Simpson's defence team, gave a talk at the "high level symposium of the Sino-American criminal adjudication practice" held in Beijing in 2001, he pointed out that the success of the defence

---

<sup>44</sup> Ibid.

<sup>45</sup> This is a case involving a famous black football player, Simpson, who was prosecuted for murdering his wife and her boyfriend.

in this case rested on a blood-stained glove presented by the police. It was illegally put in the house by the police by breaking a window. Although there was almost certainly sufficient evidence to prove Simpson's guilt, the defence team took advantage of this small deficiency in legal procedures to build their defence. They said to the grand jury that perhaps Simpson had killed people, but the police had presented a piece of false evidence. If the police could present one piece of fake evidence, they could have presented a second and a third and so on. He illustrated this by saying it was just like a person who found an insect in his noodles, who then dumped the whole bowl of noodles rather than wait for a second insect. A famous principle with respect to legal evidence was "do not pick up any fruit from a contaminated tree".

This case reveals that sometimes, in order to enforce the rule of law, a society may pay a price: let a real criminal go free. It highlights the importance of procedural justice in protecting a suspect's legal rights and keeping a balance between judicial power and the citizens. This case gives a positive signal to the police by warning them to act within the law. If a tiny mistake was ignored, more illegal practices would happen in the future, leading to no guarantees for human rights. However, this principle revealed by the Simpson case is difficult to understand in China. Both officials and the people cannot accept the idea that, in order to follow certain legal procedures, the court must set a real criminal free into the community. Community safety is more important to the public than that of individuals. Therefore, the first thing in building a society based on the rule of law is to transform people's minds. Judicial fairness includes both procedural and substantial fairness, and sometime a fair procedure is more important than substantial justice in protecting human rights.

Most witnesses are reluctant to go to the court. They prefer to be interviewed by judges outside the court rather than confront litigant parties. In practice, witness statements are usually read out in the court: there is no cross-examination of witnesses. The lack of witness examination in court may be attributed to the lack of effective protection and financial reimbursement for witnesses. Moreover, the judicial system itself and the influence of culture also contribute important reasons to this failure. People have learned not to interfere in other people's business, including witnessing in the court against one side for fear of damaging a harmonious neighbourhood. Although the new CPL states that it is a legal responsibility for a person to be a witness in the court, a witness might obey the court order by turning up at the court in order to prevent breaking the law, but he would answer "I don't know" to all inquiries. In this situation, the judges can do nothing. Thus the problem in the witness system remains unresolved.



The legal culture is also an important factor behind judicial corruption. Even if the judges are knowledgeable scholars and there is no external influence, the judiciary still cannot be relied on to be fair and clean because of the wide and complicated personal and social networks and connections that exist. Many judges have worked in their jurisdiction for a long time and have formed a stable network. In this situation, it is difficult for a fair judiciary to be realised. The use of connections in a lawsuit seriously breaches the fundamental principles of the rule of law, which further reminds people of the image of the law and courts in traditional times.

In recent years, some reforms have been carried out to prevent judges from handling cases they have connections with. However, favouritism in judicial practice remains widespread. For example, the revised judges' law and other regulations made by the Ministry of Justice ask judges to withdraw from cases with which they have connections, and to be responsible for the enforcement of prosecution of cases they have handled. Some scholars suggest that judges should change work location regularly in order to separate them from local connections. However, in terms of the huge number of Chinese judges (there are about 180,000 judges and other judicial personnel, 300,000 cadres in the judicial administration, procuratorate and police) and other practical difficulties, such a plan is not feasible in practice.<sup>46</sup>

The importance of social connections or relationships is a feature also in China's business culture, which has become an individual case study in the academic and business world in the West.<sup>47</sup> Taking contractual negotiations of joint ventures as an example, a Western scholar asked whether a rational-legal institutional framework is emerging in business negotiations in China or whether the relationship [*guanxi*] between negotiators is still very important in getting things done.<sup>48</sup> The contract reflects mutual agreements in terms of the reliance of contractual parties on a rational-legal system, thus this writer notes, the joint venture relationship involves negotiations between organisations from different cultural and institutional backgrounds; this unfamiliar situation between the partners might push toward a more formal rational-legal approach in an economic agreement. The significance

---

<sup>46</sup> Jing Hanchao (Vice president of the Hebei provincial supreme court), "Zhongguo wenhua yu sifa gaige" [The Chinese culture and the judicial reform], speech at the *Xinan zhengfa daxue yantaohui* [The symposium held in Southwest China University of Political Science and Law], *Guo fa wang* <http://www.law.com.cn> (27 March 2002).

<sup>47</sup> For example, see Pitman Potter, *The Chinese Legal System: Globalisation and Local Legal Culture* (London and New York: Routledge, 2001); Guthrie Doug, *Dragon in a Three-piece Suit: The Emergence of Capitalism in China* (Princeton: Princeton University Press, 1999); Richard P Appelbaum, et al (eds), *Rules and Networks: The Legal Culture of Global Business Transactions* (Oxford: Hart Publishing, 2001).

<sup>48</sup> Guthrie Doug, *Dragon in a Three-Piece Suit: the Emergence of Capitalism in China* (Princeton: Princeton University Press, 1999), pp. 155-177.

for such comparison, the writer states, is that if the overwhelming practice in China is to rely on connections and trust to conclude agreements, this will have a significant impact on the direction of economic reforms, and the type of legal system that eventually emerges.

The result of such comparison turns out to be that foreign investors, who have been used to a rational-legal system and predictable outcomes, favour the use of arbitration clauses in joint-venture contracts, instead of lawsuits, reveals a deep distrust of China's legal system. They regard the institution of arbitration as more reliable than that of the judiciary in achieving a democratic resolution to an agreement. In contrast, a Chinese organisation, which has a close relationship with the administration, will favour settling dispute through the Chinese legal system since they can seek social connections to affect the courts, rather than use the international method of arbitration.<sup>49</sup>

This result of comparing Western and Chinese business culture reveals different legal culture. It reflects the distrust of Western businessmen in China's courts and laws, and at the same time shows that Chinese counterparts are well familiar with the process of the courts in which they can seek wide connections to get things done rather than have good faith in the legal system itself. Over twenty years of legal reform has made some improvements in the traditional attitude towards the law and court, in areas such as favouring the rule of man, ignorance of rights, worship of officialdom, and the instrumentalism of law.<sup>50</sup> However, the rule of law is far from being fully understood and accepted as a part of the culture among the people, the officials and even the legal profession,<sup>51</sup> as revealed below in surveys conducted in the mid-1990s.

The legal consciousness of professionals, especially judges, should be a yardstick by which to measure whether the rule of law is in existence. These people are highly professional and not subject to the control of political power and other kinds of interference, but adhere to social justice. However, the survey among judges about the meaning of law shows that 73.8% regarded law as the will of the ruling class, 8.7% as the implementation of justice, 17.1% as a just system and a set of rules, and 0.4% had no idea about how law could be assessed. Compared to judges (29%), 30% of lawyers in the survey knew the contents of

---

<sup>49</sup> Ibid.

<sup>50</sup> Generally see Zhang Shuming, *Zhongguo 'zhengzhi ren': Zhongguo gongmin zhengzhi suzhi diaocha baogao* [China's 'political men': report of investigation on political quality of Chinese citizens] (Beijing: Zhongguo shehui kexue chubanshe, 1994); Xia Yong, *Zhouxiang quanli de shidai: Zhongguo gongmin quanli fazhan yanjiu* [Toward a time of rights: study on the development of citizen rights in China], Beijing: Zhongguo zhengfa daxue chubanshe, 1995; Gong Xiangrui, *Fazhi de lixiang yu xianshi* [The ideal of the rule of law and the reality] (Beijing: Zhongguo zhengfa daxue chubanshe, 1993).

<sup>51</sup> Li Lin, "Fazhi de linian, zhidu he yunzuo" [The concept, system, and operation of the rule of law], *Fali kexue*, no. 4 (1996), p. 7.

the ALL and other laws.<sup>52</sup> This indicates that judges are still strongly influenced by the ideology of class struggle which treated law as a tool of the ruling class.

As for the awareness of rights, such as democratic rights, the role of law, and rights concerning litigation, knowledge among citizens was patchy and generally poor.<sup>53</sup> For example, when citizens' rights were infringed by the government, 20.7% of the interviewed people chose not to protest, 19.7% filed administrative litigation, 10.6% sought help through personal contacts, and 9.8% reported the matter to the relevant authority. The rest 39.2% of the people did not answer the survey or answered, "do not know."<sup>54</sup> This result reflects the traditional attitude that people fear authority and the law.

In a society based on the rule of law with well-defined rights and responsibilities for its people, everyone knows when an individual's rights and interests are infringed; he/she will use legal means for retribution and protection. Apart from basic human rights such as personal freedom, dignity and property rights, citizens also enjoy litigant rights and various economic, cultural and political rights. Laws are designed to safeguard individual rights and freedoms rather than prevent state interests from being breached by citizens and companies. Being aware of and safeguarding these rights, people will force state agencies and officials to act within the law and to reduce the abuse of the law. If citizens can actively participate in state management and supervise the structure of power, they can claim their rights and protect their rights.<sup>55</sup> If people are convinced that the law applies equally to everyone and protects every individual, they will build their confidence in the new legal order. Building the concept of rights will help foster a good legal consciousness.

However, the importance and scope of citizen rights has not been fully understood or adequately defined in the law. Take the right to litigation for example. In spite of rapid increase in cases taken to court, most people remain in favour of extra-legal means to resolve their conflicts. This attitude is not only a continuation of the legal tradition but also a response to the current judicial practice. Even some very serious cases such as rape are often resolved between both parties. A considerable number of civil and commercial cases are settled outside the courts each year, especially cases against a state agency, for the reasons discussed in chapter five.

---

<sup>52</sup> Gong Xiangrui, p. 73.

<sup>53</sup> Gong Xiangrui, p. 25.

<sup>54</sup> Gong Xiangrui, p. 94.

<sup>55</sup> Ma Changshan, "Gongmin yishi: Zhongguo fazhi jincheng de neiquli" [The consciousness of citizenship: the internal driving force for China's legal system process], *Faxue yanjiu*, no. 6 (1996).

With the development of a new market economy, concepts such as social justice, efficiency, social control, and the protection of rights, all need to be properly defined.<sup>56</sup> The economic development creates a situation in which the leadership may recognise the need to make laws relating to the protection of rights and interests. Therefore, the old concept of the relationship between the state and the individual with respect to rights and obligations should be re-evaluated.<sup>57</sup> China's new concepts of rights and responsibilities emphasis the balance between the two with no one prior to another. This combination of rights and responsibilities is in compliance with Party requirements of Chinese characteristics. Since the reform and opening up, the relationship between the state and society has been gradually changing because the centralised economic system no longer exists as before, and social interests are becoming increasingly plural and they need to be treated equally before the law by changing civil and public laws.

As Keith and Lin observe, the new slogan "small government and big society", which has been advocated to rectify the irrationality of an old economy, would not work effectively in protecting rights if the state failed to actively enforce the rule of law in order to assure social justice. However, they state, the regime has shown an ambivalent attitude towards the rule of law by both emphasising the supremacy of the law and restricting political power by the law, and the importance of relying on a strong state to reinforce the rule of law and supports social justice.<sup>58</sup> The collapse of the Guangdong International Trust and Investment Corporation (GITIC) is an example in which the state would depart from the rule of law when that suited its needs.<sup>59</sup>

---

<sup>56</sup> Ronald C. Keith and Lin Zhiqu, *Law and Justice in China's New Marketplace* (New York: Palgrave, 2001), p. 11.

<sup>57</sup> Keith and Lin, P. 9.

<sup>58</sup> Ibid, p. 43.

<sup>59</sup> The GITIC was established in 1980 by Guangdong provincial government. By 1988 it had expanded its business to 1,000 areas with an asset of more than 30 billion *yuan*. As a state-owned company, the legal risk of the company was ignored since investors assumed that the provincial government or even the central government would ultimately guarantee any debt the company incurred. Before the collapse, GITIC bonds were yielding 250 basis points above the rate of US treasuries, and thus many foreign investors put their money on the company bonds, despite that fact that the relationship between the company and its sovereign was unknown. In order to keep track of external debts the central government regulations required that loans by foreign lenders to domestic Chinese enterprises be registered with the State Administration of Foreign Exchange (SAFE). Unregistered debt is mostly unenforceable under Chinese bankruptcy law. By 1995 the company further expanded its business scope, and later it illegally absorbed deposits from 25,000 local depositors at an interest rate much higher than that set by the People's Bank of China (PBC). In October 1998, the PBC closed GITIC and its several branches in Guangdong because it had incurred debt of approximately USD 4.5 billion, of which the foreign debt was approximately USD 1.93 billion, half of which was not registered with the SAFE. In 1999, GITIC applied for bankruptcy, and the central and local governments refused to undertake any responsibility for the GITIC's debt, since the legal framework in this area was unclear. Thus the application of bankrupt law rather than central financial policies resulted in the company avoiding heavy foreign debt, left many foreign creditors



The implementation of economic reform imposed from above has hampered the emergence of a civil society in China that will foster a legal culture of a modern rule of law. A new development is the close co-operation between officials and new business group, both of whom share a dependence on the state. Most township and village enterprises and new economic players rely on local governments for resources. Non-governmental organisations and economic units are not independent interest groups, but instead act as a bridge between the government and the society. Socialist corporatism today is obstructing the wider recognition of individual and organisational autonomy. If the law does not restrict the Party and the government from interfering in the economy, it will be difficult for people to conduct market activity in accordance with fair and accountable principles. This will hamper the success of a market economy and the emergence of a civil society in China.

It is clear, therefore, that the present legal culture is far from supporting the establishment of the rule of law. Whether in economic, political or in social life, China's tradition, culture and some current practices are hampering this process. The traditional mentality of state administrators and people towards law permeates their every day life. The fostering of a modern legal culture is crucial for the reform of the legal system.

The Party has called for combining the rule of virtue with the rule of law in order to improve the general moral standard of the public, especially that of state officials and members of the legal profession. In official texts, socialist culture should comprise all fine cultures, fully reflecting the spirit of the times and of creativity. It should include developing the fine cultural traditions inherited from Chinese history and from the revolutionary traditions. The Party's ethical foundations for society include patriotism, collectivism, and socialism, a text on socialist spiritual civilisation, based on traditional morality and communist ideology. Like traditional Confucian officials, the CCP, many scholars, and the new rich entrepreneurs regard the rule of law alone as insufficient to deal with ever-increasing corruption and crime in the economic sphere. The addition of an ethical and cultural program is required.

The combination of the rule of law and the rule of virtue is a mix up of the traditional rule of man, the role of the Party and the requirements for establishing a socialist market economy. It shows that the CCP is using multi means to administer the state rather than relying on the rule of law. The need to maintain Confucian traditions and values is

---

with limited or no remedies. For a close study of the case, see William Gamble, "Economic Effects of Legal Infrastructure - Collapse of the Guangdong International Trust and Investment Corporation", *the University of Virginia Darden Graduate School of Business Administration Alumni Forum*, 25 March 1999 (<http://www.Darden.Virginia.edu/>). It can be accessed through the website of the *Emerging Market Strategies Company* found by the writer, (<http://www.xensei.com/users/gamble/Guang.htm>).

obviously useful to the Party-state, as it stresses respect for authority and the existing order, although the potential risks to China's modernisation.<sup>60</sup>

In contemporary China, legal culture is composed of three parts: traditional legal culture, the PRC elite legal culture, and legal culture among the ordinary people.<sup>61</sup> Tradition and PRC elite culture in legal system are continuously affecting and determining the direction of the legal reform. Since all round reforms in China is a top down process, the ordinary people usually are not important in affecting the formation of a modern legal culture. However, tradition has become a part of public culture, and the plural interests arising from the market economy will also bring some, limited perhaps, changes to the attitude of the public towards rights and law. This change may also be taken account by the ruling elite when they make policies relating to legal development. To date, the sign for this change and its impact on the elite legal idea has not come into being, due to the overall level of legal consciousness remains weak.

### **3. A case study: the attitude towards lawyers**

People's attitude towards the legal profession often sheds light on the level of legal development in a society. While the people have deep distrust and fear of judges, the police, prosecutors, and governmental officials, they have an even deeper disrespect for lawyers. Lawyers' position in contemporary China has provided a particular insight into the difficulties facing the development of the rule of law.

The existence of lawyers in the legal system is not a Chinese tradition, but a completely Western transplantation, which was started in the early twentieth century, but never fully developed in practice until the 1990s. With the intensification of economic reforms, lawyers are playing an increasingly important role in protecting the legitimate rights and interests of citizens in contemporary China.

Obstacles facing defence lawyers in cases of criminal justice highlight institutional disrespect for and suppression of lawyers. Any sign of lawyers showing their independent opinions will result in suppression by the police, judges, and prosecutors and by local Party and government authorities.<sup>62</sup> For example, they are under pressure not to remain unbiased in cases involving local parties or government agencies. They are also under pressure not to

---

<sup>60</sup> Tian Chengyou, "Rujia dezhi sixiang de de yu si" [The gains and losses of Confucian thought of the rule of virtue], Beijing University website, 26 March 2002 ([www.chinalawinfo.com/research/lgyd/details.asp?lid=3387](http://www.chinalawinfo.com/research/lgyd/details.asp?lid=3387)).

<sup>61</sup> Pitman Potter has an agreement to this view in his new book, *The Chinese Legal System: Globalisation and Local Legal Culture* (London: Routledge, 2001), p. 8.

<sup>62</sup> *Lawyers' Committee for Human Rights*, March 1998 ([www.lchr.org/pubs/descriptions/chinalaw.htm](http://www.lchr.org/pubs/descriptions/chinalaw.htm)).

take politically sensitive cases and will suffer reprisals if they do so. In practice, the biggest obstacle bringing about change in lawyers' situation comes from the attitude of judicial personnel towards lawyers. During the judicial process, lawyers are usually not well respected, and their opinions are ignored. Lawyers have no recognised position and are subject to the superiority of judicial officials, especially since the latter stand for the state interest and can make the final decision. As a popular saying among lawyers puts it, "anyone is a father [in litigation], only lawyers are grandsons." [诉讼中人人都是老子，只有律师是孙子] Even in front of the clerk of the court, lawyers have to be cautious, in case they incur some displeasure that would result in unfavourable consequences for themselves and their clients.

As a separate entity, it is difficult for the legal profession to become a part of an authoritarian culture. Judicial personnel have the strong-minded attitude of officials and look down on lawyers, who have no official background, although they are usually better-educated compared with judicial officials and better equipped with legal skills. An Official is always more powerful than an ordinary subject in China's traditional culture. In addition, the different professional background between judicial personnel and lawyers results in alienation between them. Judges and members of the procuratorate are not professionals, but enjoy state power, which enables them to use power at their own discretion in a case, in order to compensate for their disadvantage compared to lawyers.

Despite holding professional qualifications and legal skills, lawyers can do nothing without the support of judicial power. They have to cultivate a special relationship with judicial personnel in order to succeed in their careers. This abnormal relationship between judicial personnel and lawyers, based on the inferior position of lawyers compared to judges, creates tremendous opportunities for corruption and the miscarriage of justice. It is a reality at the local level in China that judicial officials and lawyers have formed mutually beneficial interest groups within and outside their workplaces.

This clearly reveals lawyers' subordinate position to judges. Outside the courts they address each other as brothers [*chen xiong dao di*, 称兄道弟]. Sometimes lawyers rely on the judge to introduce the case. Under the current judicial practice, some lawyers will build a good relationship with judges, even if this is against their conscience. This situation influences many people in deciding whether they want to go to the court, and if they choose to do so, whether it is necessary to retain a lawyer. They consider that retaining a lawyer is a waste of money, and they prefer to seek the help of a judge.

Discrimination against lawyers also comes from other state agencies, such as the ICAB, Tax and Price Bureau, and the Post Office, from whom lawyers often have to seek

help. These agencies may not directly interfere with lawyers' work, but they are reluctant to co-operate when lawyers require them to provide evidence, since lawyers have no state power and cannot mandate them to do so. They consider that lawyers represent private interests, and they can arbitrarily impose high charges for lawyers' request for information and evidence. It was reported that a private businessman was prevented by the local ICAB from retaining a lawyer for his company. Since the Bureau was in charge of local enterprises, it tried to maintain its control over local businesses, considering the participation of lawyers to be unfavourable and inconvenient.<sup>63</sup>

The personal safety of lawyers in their work is sometimes not assured. According to the All-China Lawyers' Association (ACLA), the number of various criminal charges against lawyers since 1996 amounts to over 100 cases since 1996. The actual incidents are more than the published figure. More than 300 lawyers have been maltreated by various measures ranging from criminal detention, arrest, being putting on the most-wanted criminal list, labour camp, put on bail while waiting for trial, tried in the criminal court and sentenced. Between 10 and several dozen incidents involving lawyers being illegally detained, arrested, attacked and expelled from courtrooms have happened each year.<sup>64</sup> The year 1995 witnessed a sharp increase in lawyers being accused and humiliated, and was called by lawyers and legal scholars "the year of lawyers' suffering" [*lǚshi shounan nian*, 律师受难年]. At the time of writing this thesis, there are still some lawyers being detained and the effort to rescue them is being made by the ACLA and some NPC members.

The following cases involve the court suppression of lawyers who tried to express their different opinion.<sup>65</sup>

He Xin, a lawyer in Jiangxi, offended the court president by pointing out illegalities in a trial. The latter used his power to prohibit his court from accepting any cases represented by He Xin. He did this by refusing to accept any legal documents drafted by He. He Xin appealed to the provincial Discipline and Investigation Commission (the Party supervisory organ) in 1995. At the same time, the Commission received some letters criticising the court president's misconduct. He Xin was assumed to be the writer of these letters. The court president accused He Xin of libel and taking advantage of his connection with the local prosecutor, but the latter refused to bring a charge against He as he had no proof. The president then filed a lawsuit against He in his own court. During the trial, the president distributed material stating that He Xin did not have a lawyer's qualification and that the

---

<sup>63</sup> *Zhongguo lǚshi xiehui* [The All China Lawyers' Association, ACLA] website, 27 March 2002 ([www.acla.com.cn](http://www.acla.com.cn)).

<sup>64</sup> *Ibid.*

<sup>65</sup> *ibid.*



procuratorate was investigating him. The trial lasted for two years and finally sentenced He to one year in prison for defamation of the court president.

In 1995, a lawyer, Zhang Songmin, was beaten by court police, because he disagreed with the judges in the trial. He was detained for ten days for interfering with the execution of official duties. In the same year, a Heilongjiang lawyer, Zhou Changxi, took part in a lawsuit held in Hebei. He had a disagreement with the judges during the trial that resulted in him being handcuffed to a chair by three court police and being beaten for 75 minutes. This caused cerebral concussion, a clot of blood to form in his the head and other injuries. Also during this year, three lawyers in Liaoning were expelled from the court because their opinion differed from the judges. This gained nationwide attention.

The Zhang Jun case (a senior lawyer in Taiyuan, Shanxi) has attracted wide attention in China with respect to the maltreatment of lawyers.<sup>66</sup> Zhang Jun had a high reputation in Shanxi. He was a member of both the officially approved China Democratic League and the Shanxi provincial People's Political Consultative Conference (SPPCC). He was also a scholar-lawyer (medical consultant and Dean of the Shanxi Provincial Political and Legal Office). In 1990, he was arrested by the police in Xiyang County in Shanxi in the name of resisting the enforcement of court decisions. Zhang protested that it should be the client who should be held responsible for resisting the enforcement of the court decision rather than the lawyer. The arrest was carried out without the knowledge of the Taiyuan judicial authorities. The county police interrogated and maltreated Zhang, in turn, day and night, without allowing him to eat or sleep. Zhang was in his 60s and this treatment caused gastric bleeding and loss of consciousness. The police, fearing his death, called the ambulance to send him to the hospital but were stopped by the political secretary of the local PSB, who pulled out the tube connecting Zhang to the infusion, in spite of the objection of the doctor who was treating Zhang.

The reason behind the arrest was tracked to an occasion one year ago in 1989, when Zhang represented a case in which his clients, the villagers of Pangjiayu, complained at the Xiyang county government's action of giving 500 *mu* of their village land to the next village. Zhang stated in the court that the acquisition of land had infringed the collective-owned property rights enjoyed by his client. The Xiyang court, which was instructed by the local government, rejected Pangjiayu villagers' request for the return of the requisitioned land. Zhang appealed on behalf of the villagers, but the second trial sustained the previous decision. Zhang then appealed to the provincial Peoples' Congress and Political Consultant

---

<sup>66</sup> *Zhongguo lüshi xiehui* website, 5 June 2002 (<http://www.acla.com.cn>).

Committee. At the same time, he convened an academic debate in which the legal experts who were participating all considered the court decision to be wrong.

In March 1990, the provincial government held a meeting attended by government court officials to discuss this case. Zhang reported the experts' opinion on the case to the meeting and then criticised the Xiyang county government saying its decision had seriously infringed his clients' property rights to land, and that it had breached the constitution and the law by the illegal detention, beating, and harassment by using a police dog, of the villagers during the forceful land requisition. This had been done in order to pursue private interests. Zhang's speech offended the corrupt officials so much that the whole Xiyang authority endeavoured to take an open revenge against Zhang Jun, aiming to bringing him down. They wanted to prove which one was more powerful, Zhang's influence in Shanxi legal circles or the governmental power (even if a county level).

In spite of these threats, Zhang Jun insisted in sticking to his opinion in order to protect his client's interests. At the same time, as a member of the SPPCC, he had the legal right to expose and supervise judicial and administrative corruption at the same level as the committee. In the end, his persistence resulted in his secret arrest. During the interrogation, the county prosecutors said to Zhang, "Don't be too proud. As long as your case is in our hands, we can easily change the nature of the case as we wish, although we will meet more difficulties and need to make greater efforts in your case compared to other cases."

In January 1991 the Xiyang court tried this case, and Zhang's defence team, led by Li Fei, who was jointly retained by the Shanxi provincial Justice Bureau and the provincial Bar Association, were prevented from meeting Zhang. When the trial started, the defence lawyers were not permitted to give their speech, and Li Fei had to grab the microphone to quickly read out several pieces of evidence that proved Zhang's innocence. The court president, Chen Laixi, ordered the lawyers to be dragged away from the courtroom into a rest room. Chen told Li Fei that the speech he had made in the court was not acceptable and must be withdrawn in order for the trial to continue. Li refused to change his statement. Over twenty policemen then rushed into the room and hit the lawyers with police baton. The beating and the noise made by the suffering lawyers upset the people outside in the courtroom. When later the lawyers were pushed out of the rest room and into the court, they grabbed the microphone again to speak to the public, "we came here to perform our legal duty but our personal safety could not be guaranteed, so we have to leave." With the help of some of the people listening (most of whom were Zhang's clients from the village), the lawyers escaped from the court. Without a fair trial, the Xiyang court eventually sentenced Zhang Jun to 15 years' imprisonment.

This was a very typical case involving the use of political and judicial power to prevent a lawyer from performing his legal duty. This case was clearly a miscarriage of justice. The Xiyang officials got what they wanted, while all the superior authorities could do nothing to prevent this from happening. This reveals the great problem of the supremacy of the authority. The Shanxi Bar Association reported this case to the provincial Peoples' Congress, requiring that it investigate it, in order to safeguard the legal rights of lawyers. Zhang's unfair treatment aroused a wide sympathy and support from all walks of life. Fellow lawyers encouraged Zhang not to give up, regarding his fate as a sacrifice in the effort to safeguard the law and human rights during the process of building the rule of law. The ACLA and the Shanxi Bar Association made several attempts to rescue Zhang Jun, and the latter even established a special association for the protection of rights named after Zhang Jun. When Zhang was arrested, his wife, a lawyer too, was also arrested and was not set free until 1993, on the condition that she did not appeal for her husband's release.

In 1995, the SPC intervened in this case, and the Shanxi provincial government instructed the provincial higher level court to retry the case. Zhang Jun was declared not guilty and was released in 1997, but the formal judgement was not made until June 2001 in which Zhang Jun was cleared of two crimes out of the three charges (taking bribery, extortion and inciting villagers to resist the enforcement of the court decision) made against him by the Xiyang court. However, the third charge remained. Moreover, none of the government and judicial officials involved in persecuting him was punished, and Zhang did not obtain any compensation. This last decision remained unacceptable to Zhang Jun. After his release he continuously appealed to the relevant authorities, demanding that these abusive and corrupt officials be dealt with by the law; and also that he be cleared completely. His appeal was consistently given wide support.

Fifty-one members of the SPPCC signed a joint appeal to the NPC, questioning why the unjust treatment of Zhang Jun, which had had such a great and adverse impact on lawyers and the attitude of the public towards the authority of law, could not be rectified for so long, who was resisting the rectification, and why some officials frequently abused their power and considered they were superior to the law, and which should be greater between the law and the power. However, up until 2002, Zhang Jun was still fighting for his rights by submitting his 647<sup>th</sup> appeal to the supreme authorities and this case is still one of the motions made by the NPC members to the annual conference of the NPC and the CPPCC (PRC Political Consultant Congress).<sup>67</sup>

---

<sup>67</sup> *Falü fuwu shibao* [Legal service times], 12 April 2002, p. 7.

The official attitude towards lawyers inevitably has a great impact on the general public. The historic weakness of law versus the power and negative image of the “imperial litigant masters” has preoccupied people's minds. Most people get their image of lawyers from films about Western courts. They regard lawyers as ideal protectors of the rights of the weak and justice without fear of any pressure. In reality, lawyers can only provide a legal service based on evidence and by only representing the interests of one side in each case. They may promote social justice through their work, but are not powerful gods of justice. The fulfilment of social justice is mainly dependent upon the judiciary and other state authorities.

In practice, lawyers are always expected to win a case; if they do not win they will be blamed or despised for not performing their duty. A client, who needs the help of a lawyer, may show his respect for the lawyer and co-operation with him at first. But once his case has been lost, he will often harbour a grudge against his lawyer. In any legal system, lawyers are expected to protect rights and interests only according to the law and procedures, by using their professional skills. In China, many clients do not realise that the final result of a case is determined by many factors beyond the control of their lawyer.

People also assume that lawyers have great knowledge and are capable of representing any type of case. A lawyer is expected to take any types of case. Some lawyers indeed take on a wide range of cases in order to make money. But in a rational legal system, a lawyer can only be a specialist in one or a few fields. Many people regard lawyers as bad people who like to stir up disputes and involve people in litigation, and also defend criminals.<sup>68</sup>

Lawyers often suffer from the maltreatment of the litigant parties, especially the opposing party in a case. In the same year in 1995, for example, Ren Shangfei, a Hebei lawyer, was held as a hostage and was maltreated for 120 days by the opposing party, a manager of a fireworks factory in Hunan. Ma Haiwang, dean of a Shanxi law firm, represented the wife in a divorce case. When he was in the firm's office one day, the husband in the case came with several people and raided the firm, beating Ma for five hours, causing massive injuries. One eye had been gouged out and around the other eye was split and required over twenty stitches. There were also serious injuries to his body.<sup>69</sup>

Two lawyers in Sichuan went to a court in Dali, Yunnan, to take part in a lawsuit for their client. The parties of the opposite side used an axe to burst into the hotel room where the two lawyers were and beat them up, and even poured the boiling water over the lawyers'

---

<sup>68</sup> Qian Lieyang, "Bianhu lüshi de zhiye jiazhi" [Criminal defence lawyers' professional value], *Zhongguo lushi* [Chinese Lawyer], no. 7 (2001).

<sup>69</sup> *Zhongguo lüshi xiehui* website, 27 March 2002 ([www.acla.com.cn](http://www.acla.com.cn)).



heads, causing serious damage to the face of and arms of one of the lawyers. Pei Shan, a female lawyer in Urumqi, was beaten and humiliated in the courtroom by the opposite parties without the court officials protecting her or even preventing the attack. She suffered broken ribs.<sup>70</sup>

In many clients' eyes, lawyers just pursue their own interests and are unreliable; in judges' minds, they only represent one of the parties in a case and only know one side of the picture, so judges ignore their statement in the court; in ordinary people's minds, they help the rich and not the poor, like the litigant masters in the past. Thus, Chinese lawyers are struggling in a complicated network of social relationships and discrimination resulting from the current legal system. The social network of lawyers is more important than their legal knowledge in becoming successful and rich. The requirement for the free development of the legal profession is incompatible with the present official control of civil organisations. In a modern society, lawyers have various roles to play, such as participating in lawmaking and the decision making process. It is obvious that the best environment does not exist for lawyers to fully play their role in contemporary China.

In some circumstances, they cannot even protect their own rights, not to mention protecting their clients' rights and interests, and maintaining a balance between state power and interests of the individual. In a state based on the rule of law, an independent legal profession is a guarantee for fulfilling human rights and the rule of law. Whether a society respects its lawyers or not is an indication of the level of the rule of law.

On the other hand, however, powerful forces continue to hold back progress and change in legal reforms.<sup>71</sup> China's history and culture does not favour an autonomous legal profession. In an authoritarian society, the independence of any social organisation in society will be restricted. The current situation in the development of the position and work of lawyers reflects how far China is from the goal of building a country based on the rule of law.<sup>72</sup> Over twenty years have passed since the lawyer reform started in 1980, but legislation in this area remains insufficient and many obstacles restrict the development of the position of lawyers. They are the lowest level in the legal system, and their social functions are still not acknowledged and respected by officialdom and populace.

---

<sup>70</sup> Ibid.

<sup>71</sup> Randall Peerenboom, *Lawyers in China: Obstacles to Independence and the Defence of Rights*, New York: Lawyers' Committee for HRs Publication, 1997.

<sup>72</sup> Li Xuan, "Zhidu quexian yu guannian diwu: dangdai lüshi ye de liangda kunjing" [Shortcomings in the system and resistance in the mind: two major difficulties of lawyers profession in contemporary times], *Zhongguo lüshi xiehui* website, 30 March 2002 (<http://www.chineselawyer.com.cn>).

#### 4. Conclusion

This chapter discusses cultural obstacles for implementing the rule of law, which is reflected by both official and ordinary people's opinions and attitudes towards law, the court, business behaviour and lawyers. The traditional mentality and culture, which emphasises the superiority of power over the law and the use of wide social connections, continues to influence the mind of the Chinese people to this day. The poor legal consciousness among Party members and administrative officials as well as ordinary people restricts the functioning of even a best legal system.

While the legal tradition is continuing to affect both elite and common people in contemporary China, it is the ruling elite culture that dominates and determines the direction and content of the development of a legal culture in current China. The vast majority of people have little influence on legal development, but continuously following traditional informal means and customs to resolve social disputes in these times of legal reform. Both economic and social development to this day has not given rise to an autonomous civil society or to a middle class as opposed to the state power. The new emerging business class has become closely dependent on official support based on transaction of money and administrative power. The regime has all the time suppressed any free opinions in the media, and nowadays also on the internet articles, restricting any independent development of social organisations, such as religious groups, political associations, labour unions and the legal profession. This further hampers the emergence of a civil society, which is supportive for a legal culture. Thus conditions for nurturing a modern legal culture, including political democracy, legal independence, economic autonomy and self-aware social force, are underdeveloped or do not exist.

*Yi fa zhi guo* is not the same as the rule of law, because the latter originates in the West from below rather than from above through the ruling elite and its scholars. The change in people's attitude is a long-term and gradual process, so in China a legal culture that supports the rule of law may take several generations to foster until such ideas as the supremacy of law and an independent judiciary so essential to the rule of law is fully realised in the whole society. The particular context of Chinese legal culture, which combines an authoritarian tradition, instrumental and formalist PRC ideology, and the strong resistance to formal legal channel among the public, poses great difficulties in the implementation of the rule of law. An independent judiciary and legal profession is not existed in the current political structure. The transformation of a rule-of-man legal culture will inevitably be a long process, which restricts the progress of the rule of law.

## Chapter Seven: Conclusion

Legal reform, which is primarily motivated by facilitating economic reform, is also a political self-legitimizing process for the PRC regime. The law in China, for a long time, has been a flexible tool for the ruling elite in maintaining social order and an instrument of punishment rather than a means of rights protection and power constraint. Since 1978 and especially after 1992, the CCP leadership has begun to take legal reform as an initiative to facilitate the development of a market economy, from calling for “strengthening [the] socialist legal system” to “administering the state according to law and establishing a socialist rule-of-law country”. The regime has realised the importance of the law in regulating the economy, the state administration, and society. It still uses the legal system mainly as an instrument in maintaining social stability, but the role of law has greatly expanded in contemporary China in administrative, economic, and social activities.

Since the PRC’s political legitimacy is mainly based on economic performance and social stability, the legal reform must be restricted in the current political structure and the pace of the economic reform. This constraint is manifested ideologically by the official emphasis on the four cardinal principles and the programme of socialist spiritual civilisation. In practice, the legal reform is comprised of two stages. One is to recover the legal institutions and make laws to fill in a lawless vacuum in correspondence with professional development in state agencies. The other is to establish a set of legal rules for facilitating the development of a market economy, taking account of protecting citizens’ rights and restricting governmental behaviour. The second stage is very slow and difficult in current China because the rule of law project lacks systematic and consistent support from the Party-state.

Both official and academic debate support a thick model of the rule of law in China by combining traditional legal culture and socialist values, insisting on both substantial and procedural justice. As a top-down action, the legal reform is dominated by the Party-state and thus relies on Party intention and commitment. It is also a gradual process in that transformation of people’s mind and legal culture will be a long period and that the major concern of the regime is the stability of the current political system. The official expression of China’s rule of law is a socialist rule-of law country with Chinese characteristics through combination of rule of law and rule of virtue. The regime has rejected a Western liberal democratic version of the rule of law all the time, and has always emphasises the difference between a socialist legal system and a Western one in spite of their many similarities. The public is unaware of the distinction between the rule of law and rule by law. The ruling elite decide the model and content of China’s legal development. The PRC legal scholars, with political and ideological restriction,

have participated in enthusiastic debate on a socialist rule of law, and some of them have gone beyond the Party's constraints by appealing for a Western version of the rule of law based on safeguarding individual rights and freedom, judicial independence, and the supremacy of the constitution and law.

However, the supremacy of the Party to all-round state affairs including legal matters causes problems for elevating the authority of the law. The Party does not want any institutions, such as the judiciary, lawyers, and other social groups, to become too strong to control. The prefix "socialist" in front of the market economy and the rule of law retains for the Party the major role in deciding the direction and content of the economic and legal reforms. Its actual supremacy implies that it can overthrow any judicial decisions or interfere in the judicial process whenever it finds a need. It is clear that when the CCP leadership uses the phrase rule of law they do not mean a system that gives primacy to law above political considerations and Party policy. Instead, it is a way to manage state power, regulate the economy and discipline society in light of rapidly changing circumstances.

The rule of law, whether it is a Western version or a socialist one, primarily requires that public power be legalised and restricted by law. Whether the rulers, especially the senior ones, are constrained by law or not is a fundamental difference between a rule of law and a rule by law. A major legal mechanism in holding state power accountable is the development of an administrative law system, especially judicial review or the administrative litigation in China's context. However, there are still many areas in which government acts without legality, and those existing laws and regulations are not well defined and even in mutual conflict, and the most important law for legal administration, the administrative procedure law, is still not made to date. Powerful administrative agencies at local levels frequently ignore state laws and abuse private rights and interests. All supervision including administrative redress and judicial review are not effective in curbing administrative power.

In an authoritarian regime, the police enjoy many powers. Moreover, the top concern of the Party in maintaining social stability has furthered police power. The unconstrained police power has become one of major concern because infringing human rights in contemporary China during their exercise of the power of investigating crime and maintaining social order, especially during annual strike-hard campaigns and the so-called comprehensive management of social security. The suppression of alien ideology and dissidents, such as free political opinions, activists for labour rights, and religious groups, are also carried out by the PSB and the State Security Agency. The wide use of administrative detentions to deprive people of their freedom without judicial involvement has greatly challenged the establishment of the rule of law. The concept of PRC human rights values collective and public interests above individual and private



interests, and emphasises the harmony between the rights and responsibility. This has resulted in many infringements on personal freedom and property rights, and this culture of violence towards the individual must change for China to be considered a rights-oriented, democratic state.

The market reform, on the one hand, requires free operation and equal participation of both public and private actors. This calls for a small and restricted government. On the other hand, the top-down model of economic reform needs an authoritarian government to make and enforce laws. In China, the separation between the government and economy is hard to carry out. Many industries and enterprises are still under state control and local governments are deeply involved in the operation of regional economies. As a result, the newly emerged market force has a clientelism and corporatism relationship with the state rather than a force on which a civil society is fostered. Socialist ownership and an official-based market economy only further the alienation in various social groups and encourage rent seeking. The deliberate mixing up of public and private property rights has caused widespread ignorance and infringement of property rights in the new marketplace. Conflicts between enterprises and governmental agencies and between individuals and enterprises are tremendous. Thus the market development fails to meet a Weberian requirement for a rational and legal process, and it also discourages the function of formal laws and undermines the success of a market economy.

The weak PRC judiciary has resulted in frequent failures in resolving conflicts, safeguarding rights and interests, and constraining Party and state power. An independent and competent judiciary is crucial to curb state arbitrariness and abuse. However, the institutional arrangement for the judiciary to be controlled by the Party and local administrative power trumps the principles of the rule of law. The current PRC judiciary is not independent, not very respectful and seriously corrupt. The Party wants a more competent and efficient judiciary to resolve ever-increasing disputes arising from the rapid economic development while not a too independent one to lose control. The dilemma is how to strengthen the judiciary without allowing it to become a threat to the one single Party rule. Although the submissive position of courts to political interests corresponds with the leading role of the Party, this is incompatible with the requirements of the rule of law. Institutional guarantees such as separation of judicial and administrative power is necessary because it can assure the judiciary is independent institutionally from external interference. Political democracy is also the basis for establishing the rule of law rather than something to do with Western or socialist concern.

At the same time, China's legal tradition, which has been considered a great challenge to the rule of law, continues to exert great impact on the attitudes of officials and ordinary people towards the law since both systems are based on a totalitarian government. In this

system, it is the ruling elite and its scholars that make decisions for legal development and manipulate the content of a legal culture. The public power is often more powerful than the law in getting disputes settled, officials often follow their superiors' instructions rather than abiding by law, and ordinary people distrust law and prefer non-legal means to resolve disputes by seeking personal connections or using bribery. In addition to state officials, ordinary people also lack a legal consciousness required by the rule of law. The difficulties in transforming an official-based legal culture are huge in an authoritarian country. If the legal tradition is an obstacle for China's legal modernisation, then the current political system provides favourable soil for its continuation and hampers its transformation into a culture of legality.

Like the legal reform, the PRC regime is able to involuntarily start political reform forced by the pace of the market development and foreign co-operation. The search for political legitimacy will never stop on the part of the CCP leadership because the conflict between the progress in a market-oriented economy and the political constraints for profound reform will exist throughout the whole process of the reform. However, when the Party has to give up some of its control to the law for developing the economy and curbing widespread official corruption, its supreme position will be undermined. This explains the Party-state's ambivalent attitude towards independent growth of any state institutions and social organisations, including the judiciary and legal profession, not to mention any civil rights groups.

Thus, the basic problem for the regime is how to promote economic reform and governmental efficiency while not sacrificing its ruling position. Since the key to the realisation of the rule of law is to control Party and state power, it is particularly difficult in a China ruled by a single political party in controlling and allocating state power. In this case, the authority of law will never be elevated to constrain the Party that has been above the law. If the Party and state power cannot be restricted, legal construction would only strengthen such power rather than limit it, and law would become a more advanced and effective weapon for the officials to gain personal interests and to suppress the people, which is more powerful rule by law rather than the rule of law.

The rule of law is not only a legal matter but also a political and social one. Restricting reform to the legal area is not sufficient for the success of the rule of law, which also needs political, economic, and cultural support. Without political democracy, the legal reform itself is impossible to change the underlying reasons of many problems such as a weak judiciary, officials' being above law, and corruption. It is a culture of rule of law that assures officials honest and clean rather than moral campaigns in improving official credibility, and it is a well-established legal mechanism that defines incentive structures of appointment of officials and

constrains their behaviour. The legal reform without political democracy may indeed improve the role of law while at the same time also strengthening the power of the Party-state.

Many other factors, in addition to restrictions from political, ideological and cultural areas, also affect the direction and future of the rule of law, such as the globalisation of world economy and legal systems, incentives for more foreign investments to sustain its economic growth, international pressure such as from the WTO principles for an effective judicial review and rational legal rules, and requirements for standardising its human rights, and other complicated factors from economic transition and imbalance among different regions and social members. However, in the end, the primary obstacle remains the current state structure and ideology, which have tied the hands of legal reform. The rule of law will not succeed without breaking socialist ideology and one Party rule, because a socialist rule-of-law country actually means a country based on the rule of the CCP. It is its socialist character that China's legal system should abandon rather than its Chinese character because a legal system bears inevitably some degree of its legal tradition in any society. Only political reform begins may the prospect of rule of law be predicted, or the future of the rule of law can at least be imagined with the support from political democracy. Any other difficulties facing the rule of law will be gradually improved as time moves on. Only with greater public participation in legal developments may an independent judiciary and media as well as an autonomous society come gradually into being. Without reforming the PRC's political system, the rule of law even becomes impossible for any assumptions in the near future. Under current conditions, the law is most likely to become a more effective instrument than before for carrying Party goals and policies, or in fact a rule by law, which is far away from the requirements of the rule of law.

## Bibliography

### References in English:

- Amnesty International. *China: No One is Safe: Political Repression and Abuse of Power in the 1990s*. London: Amnesty International Publications, 1996.
- China: Law Reform and Human Rights: Not far Enough*. 28 February 1997. Acc. 27 November 2001 ([http://www.oneworld.org/amnesty/press/28feb\\_china.html](http://www.oneworld.org/amnesty/press/28feb_china.html))
- “Torture—A Growing Scourge in China—Time for Action”, 12 February 2001 (<http://web.amnesty.org/library/index/engasa170042001>).
- 2002 Report—Asia and Pacific—China. ([http://web.amnesty.org/web/ar2002.nsf/asa/china?OpenAmnesty International](http://web.amnesty.org/web/ar2002.nsf/asa/china?OpenAmnesty%20International)).
- Altman, Andrew. *Critical Legal Studies: a Liberal Critique*. Princeton: Princeton University Press, 1990.
- Alford, William. “A Second Great Wall? China’s Post-Cultural Revolution Project of Legal Construction.” *Cultural Dynamics* 11:2 (1999): 193-213.
- Alder, J. *Constitutional and Administrative Law*. Basingstoke: MacMillan, 1989.
- Appelbaum, et al. eds. *Rules and Networks: The Legal Culture of Global Business Transactions*. Oxford: Hart Publishing, 2001.
- Bodde, Derk and Clarence Morris. *Law in Imperial China*. Philadelphia: University of Pennsylvania Press, 1973.
- Barry, Donald D. ed. *Toward the "Rule of Law" in Russia? -Political and Legal Reform in the Transitional Period*. Armonk, New York: M. E. Sharpe, 1992.
- Brown, Ronald C. *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics*. The Hague: Kluwer Law International, 1997.
- Bradley, A W & K D Ewing. *Constitutional and Administrative Law*. London: Longman, 1997.
- Cai, Dingjian. “Development of the Chinese Legal System since 1979 and its Current Crisis and Transformation.” *Cultural Dynamics* 11:2 (1999): 135-166.
- Chen, Philip. *Law and Justice: The Legal System in China 2400 B.C. to 1960 A.D.* New York: Dunellen, 1973.
- Chen, Feng. *Economic Transformation and Political Legitimacy in Post-Mao China: Ideology and Reform*. New York: State University of New York Press, 1995.
- Chen, Jianfu. “Market Economy and the Internationalisation of Civil and



- Commercial Law in the PRC.” in *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* edited by Kanishka Jayasuriya (London: Routledge, 1999): 69-86.
- Chinese Law: Towards An Understanding of Chinese Law, Its Nature and Development*. The Hague and London: Kluwer Law International, 1999.
- Cheng, Joseph Y. S. ed. *China: Modernisation in the 1980s*. Hong Kong: The Chinese University Press, 1989.
- Ch'u, Tung-tsu. *Law and Society in Traditional China*. Paris: Mouton, 1961.
- Clark, Donald C & James V Feinerman. “Antagonistic Contradictions: Criminal Law and Human Rights in China.” In *China's Legal Reforms* edited by Stanley Lubman (New York: Oxford University Press, 1996): 135-158.
- Clark, Donald C. “Puzzling Observations in Chinese Law: When Is A Riddle Just A Mistake?” in *Understanding China's Legal System: essays in honour of Jerome A Cohen* edited by C Stephen Hsu (New York: New York University Press, 2003): 93-121.
- Cooper, J. “Lawyers in China and the Rule of Law”, *International Journal of the Legal Profession* 1 (March 1999): 71-85.
- Corne, Peter Howard. *Foreign Investment in China: The Administrative Legal System*. New York: Trans-national Publishers, 1997.
- Craig, Edward. ed. *Routledge Encyclopedia of Philosophy* (vol. 8: *Rule of Law*). New York: Routledge, 1998.
- Dicks, Anthony R. “Compartmentalisation of Power and Judicial Restraints.” *China Quarterly* 141 (March 1995): 82-109.
- Dowdle, Michael. “Heretical Laments: China and the Fallacies of ‘Rule of law’.” *Cultural Dynamics* 11:3 (1999): 287-314.
- Doug, Guthrie. *Dragon in a Three-Piece Suit: The Emergence of Capitalism in China*. Princeton, N. J.: Princeton University Press, 1999.
- Dreyer, June Teufel. *China's Political System: Modernisation and Tradition*. London: Macmillan Press, the 2nd edition, 2000.
- Edley, Christopher F. *Administrative Law: Rethinking Judicial Control of Bureaucracy*. Michigan: Yale University Press, 1990.
- Emery, C T & B Smythe. *Judicial Review: legal limits of official power*. London: Sweet & Maxwell, 1986.
- Epstein, Edward J. “Law and Legitimation in Post-Mao China.” in *Domestic Law Reform in Post-Mao China* edited by Pitman Potter (Armonk, New

- York: M. E. Sharpe, 1994): 19-55.
- Finder, Susan. "Liking Throwing An Egg Against A Stone? Administrative Litigation in the PRC." *Journal of Chinese Law* 3:1 (Summer 1989):11-27.
- Folsom, Ralph and John Minan. eds. *Law in the People's Republic of China: Commentary, Readings and Materials*. Dordrecht: Martinus Nijhoff, 1989.
- Friedrich, C J. *Man and His Government*. New York: McGraw-Hill, 1963.
- Gamble, William. "Economic Effects of Legal Infrastructure: Collapse of the Guangdong International Trust and Investment Corporation." in the *University of Virginia Darden Graduate School of Business Administration Alumni Forum* (<http://www.Darden.Virginia.edu>), 25 March 1999. It can be accessed through the website of *merging Market Strategies Company* found by the wirtter (<http://www.xensei.com/users/gamblet/Guang.htm>).
- Gewirtz, Paul. "Independence and Accountability of Courts." *Global Law Review* 24:7 (2002). in *Yale Law School: The China Law Centre* (<http://chinalaw.law.yale.edu/html/publications.htm>).
- Goldman, Merle. *Sowing the Seeds of Democracy in China: Political Reform in the Deng Xiaoping Era*. Cambridge, Mass.: Harvard University Press, 1994.
- Gittings, Danny. *Birds in A Cage: Legal Reform in China after Mao*. Stanford: Stanford University Press, 2000.
- Gittings, John, "A Softer Approach to 'Strike Hard'." *Guardian*, 23 July 2002.
- Guo Xiaoliu. "Land Expropriation and Rural Conflicts in China." *The China Quarterly* 166 (June 2001): 422-439.
- Holmes, Leslie. *The End of Communist Power: Anti-Corruption Campaigns and Legitimate Crisis*. Cambridge: Polity, 1993.
- Hu Juan. "The Development of the Chinese Legal Profession since 1978." *Durham East Asian Papers* 9 (2000).
- Hu, Peter. "Who Owns China's Land? Policies, Property Rights and Deliberate Institutional Ambiguity." *The China Quarterly* 166 (2001): 394-421.
- Huang, Philip. *Civil Justice in China: Representation and Practice in the Qing*. Stanford: Stanford University Press, 1996.
- Iyer, V R Krishna. "Judicial and Legal Reform: Redeeming the Judicial System-- No Party Decisions Govern the State Process." *Presentation at the Fourth Consultation on Due Process in China* sponsored by the Asian Legal

- and Resource Centre of the Asian Human Rights Committee, which was held on 23th-29<sup>th</sup> May 1999 in Bangkok, Thailand. See (<http://www.google.com/search?q=Chineses+legal+reform&hi=en&start=80&sa=N>).
- Jones, William C. "Trying to Understand the Current Chinese Legal System." in *Understanding China's Legal System: Essays in Honour of Jerome A Cohen* edited by C Stephen Hsu (New York: New York University Press, 2003): 7-45.
- Kamarul, Bahrin and Roman Tomasic. "The Rule of Law and Corporate Insolvency in Six Asian Legal Systems." in *Law, Capitalism and Power in Asia: the Rule of Law and Legal Institutions* edited by Kanishka Jayasuriya (London: Routledge, 1999): 151-171
- Keith, Ronald. *China's Struggle for the Rule of Law*. New York: St. Martin's Press, 1994.
- Keith, Ronald and Lin Zhiqiu. *Law and Justice in China's New Marketplace*. New York: Palgrave, 2001.
- Keller, Perry. "Sources of Order in Chinese Law." *American Journal of Comparative Law* 42 (1994): 711-759.
- Kent, Ann. *China, the United Nations, and Human Rights: the Limits of Compliance*. Philadelphia: University of Pennsylvania Press, 1999.
- Lam, Willy Wo-Lop. *China after Deng Xiaoping: the Power Struggle in Beijing since Tian'anmen*. Singapore: John Wiley & Sons, 1995.
- Laszlo, Ladany. *Law and Legality in China: The Testament of a China-Watcher*. London: Hurst, 1992.
- Lawyers Committee for Human Rights (U.S.A) (LCHR, which is changed name to Human Rights First). *Criminal Justice with Chinese Characteristics*. New York: LCHR Publications, 1993.
- *Opening to Reform?: An analysis of China's Revised Criminal Procedural Law*. New York: LCHR, 1996
- *Wrongs and Rights: A Human Rights Analysis of China's Revised Criminal Law* (New York: LCHR Publication, 1998). For its online website, see <http://www.lchr.org> or directly go to <http://www.humanrightsfirst.org>.
- *Lawyers in China: Obstacles to Independence and the Defence of Rights*. New York: LCHR, 1998.
- Lin Bih-jaw and James T Myers. eds. *Forces for Change in Contemporary China*. Columbia: University of South Carolina Press, 1993.
- Lo, Carlos Wing-Hung. "Socialist Legal Theory in Deng Xiaoping's China."

- Columbia Journal of Asian Law* 11 (1997): 469-486.
- Lü Xiaobo. *Cadres and Corruption: the Organisational Involution of the Chinese Communist Party*. Stanford: Stanford University Press, 2000.
- Lubman, Stanley. ed. *China's Legal Reforms*. New York: Oxford University Press, 1996.
- Bird in A Cage: China's Post-Mao Legal Reforms*. Stanford: Stanford University Press, 1999.
- MacCormack, Geoffrey. *Traditional Chinese Penal Law*. Edinburgh: Edinburgh University Press, 1990.
- The Spirit of Traditional Chinese Law*. Athens: University of Georgia Press, 1996.
- McGreal, Ian. ed. *Great Thinkers of the Eastern World*. New York: HarperCollins, 1995.
- Misra, Kalpana. *From Post-Maoism to Post-Marxism*. New York: Routledge, 1998.
- Mok, Ka-ho. *Social and Political Development in Post Reform China*. London: MacMillan Press, 2000.
- Oi, Jean C. and Andrew G. Walder. eds. *Property Rights and Economic Reform in China*. San Francisco, Calif.: San Francisco University Press, 1999.
- Pan Wei. "Towards a Consultative Rule of Law Regime in China." *Journal of Contemporary China* 34:12 (2003): 3-43.
- Pei Minxin. "Citizens vs. Mandarins: Administrative Litigation in China." *The China Quarterly* 152 (1997): 832-862.
- Peerenboom, Randall. "Ruling the Country in Accordance with Law: Reflections on The Rule of Law in Contemporary China." *Cultural Dynamics* 11 (1999): 315-351.
- China's Long March towards Rule of Law*. Cambridge: Cambridge University Press, 2002.
- "A Government of Laws: Democracy, Rule of Law and Administrative Law Reform in the PRC." *Journal of Contemporary China* 34:12 (2003): 45-67.
- Potter, Pitman. "Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China." *The China Quarterly* 138 (1994): 325-358.
- "The Administrative Litigation Law of the PRC: Judicial Review and Bureaucratic Reform." in *Domestic Law Reforms in Post-Mao China* edited by Pitman Potter (Armonk: M. E. Sharpe, 1994): 276-281.
- Chinese Foreign Business Law: Past Accomplishments, Future*



- Challenges*. San Francisco: The 1990 Institute, 1995.
- “Foundations of Elite Legal Culture in the PRC: the Influence of Peng Zhen.” *Association for Asian Studies in U.S: AAS Abstract: China Session 211, 1996* (<http://www.aasianst.org/absts/1996abst/china/c211.htm>).
- “Foreign Investment Law in the PRC: Dilemmas of State Control.” in *China’s Legal Reforms* edited by Stanley Lubman (New York: Oxford University Press, 1996): 155-185.
- The Chinese Legal System: Globalisation and Local Legal Culture*. London: Routledge, 2001.
- Posner, Richard A. “Creating a Legal Framework for Economic Development.” *World Bank Research Observer* 13:1 (14 April 1997). February 1998 (<http://wbro.oupjournals.org>).
- Qian, Yinyi. “Market Economy and the Rule of Law.” *Perspectives* 1:5 (10 May 2000) ([http://www.oycf.org/Perspectives/5\\_043000/modern\\_market\\_economy\\_and\\_the\\_ru.htm](http://www.oycf.org/Perspectives/5_043000/modern_market_economy_and_the_ru.htm)).
- Priban, Jiri & James Young. eds. *The Rule of Law in Central Europe: The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries*. Aldershot, England: Ashgate Dartmouth, 1999.
- Raz, Joseph. *The Authority of Law*. Oxford: Clarendon Press, 1979.
- Rheinstein, Max. ed. *Max Weber on Law in Economy and Society*. Cambridge, Mass.: Harvard University Press, 1969.
- Ross, Claudia and Lester Ross. “Language and Law Sources of Systematic Vagueness and Ambiguous Authority in Chinese Statutory Language.” in *The Limits of the Rule of Law in China* edited by Karen Turner, et al (Seattle: University of Washington Press, 2000): 221-270.
- Saich, Tony. *Governance and Politics of China*. Hampshire, New York: Palgrave, 2001.
- Shen Yuanyuan. “Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform.” in *The Limits of the Rule of Law in China* edited by Karen Turner, et al (Seattle: University of Washington Press, 2000): 20-44.
- Svensson, Marina. *The Chinese Conception of Human Rights*. Lund: Lund University, 1996.
- Tanner, Murry Scot. “How a Bill Becomes a Law in China: Stages and Processes in Lawmaking.” in *China’s Legal Reforms* edited by Stanley Lubman (New York: Oxford University Press, 1996):.
- Thompson, Brian. *Textbook on Constitutional and Administrative Law*. London:

- Blackstone Press, 1993.
- Tu Weiming. ed. *China in Transformation*. Cambridge, Massachusetts: Harvard University Press, 1994.
- Turner, Karen G. "Introduction: the Problem of Paradigms." in *The Limits of the Rule of Law in China* edited by Karen Turner, et al (Sealtle: University of Washington Press, 2000): 3-19.
- Triska, J. "Constitution and the Party." in *Law in PRC: Commentary, Readings and Materials* edited by Folsom and Ralph Haughwout (Dordrecht: Nijhoff, 1989): 19-28.
- Vermeer, Edward B and Ingrid D'Hoohege. *China's Legal Reforms and Their Political Limits*. Richmond, Surrey: Gurzon Press, 2002.
- Vitaly, Robin. "Confucius and Early Confucianism." in *Individual and State in Ancient China: Essays on Four Chinese Philosophies*. trans. by Steven Levine (New York: Columbia University Press, 1976).
- Wang Chenguang and Zhang Xianchu. eds. *Introduction to Chinese Law*. HongKong: Sweet & Maxwell Asia, 1997.
- Wang Yan. *Chinese Legal Reform: the Case of Foreign Investment Law*. London: Routledge, 2002.
- Wang Xixin. "Administrative Law in China's Changing Society." *British Law Week: The China Connections in Legal Forum*, ([http://www.enstar.co.uk/china/law/blw/art\\_administrative.htm](http://www.enstar.co.uk/china/law/blw/art_administrative.htm)).
- Wang, James C. *Contemporary Chinese Politics: An Introduction* (the sixth edition). Upper Saddle River: Prentice, 1999.
- Watson, Burton. trans. *Han Fei Tzu*. New York: Columbia University Press, 1964.
- Waley, Arthur. *The Analects of Confucius*. New York: Macmillan, 1938.
- Wade, William and Christopher Forsyth. *Administrative Law*. Oxford: Clarendon Press, the seventh edition, 1994.
- Weber, Max. *Economy and Society*. New York: Bedminster Press, 1968.
- The Religion of China*. Glencoe: The Free Press, 1951.
- Winckler, Edwin A. ed. *Transition from Communism in China: Institutional and Comparative Analyses*. Boulder, Colorado and London: Lynne Rienner, 1999.
- Yu Xingzhong. "Legal Pragmatism in the PRC." *Journal of Chinese Law* 3 (1989): 29-51
- Zhang Qianfan. "The People's Court in Transition: the Prospects of the Chinese Judicial Reform." *Journal of Contemporary China* 34:12 (2003): 69-101.
- Zheng Yongnian. "The Rule by Law vs the Rule of Law." in *Reform, Legitimacy and*

*Dilemmas: China's Politics and Society* edited by Wang Gungwu and Zheng Yongnian (Singapore: Singapore University Press, 2000): 135-163.

Zheng Shiping. *Party vs. State in Post-1949 China: the Institutional Dilemma*. Cambridge: Cambridge University Press, 1997.

#### References in Chinese:

- Bao Wanchao. "Min gao guan: Zhongguo de xianzhuang, kunhuo yu gaige: Guangxi, Ningxia liang qu xingzheng susong de shishi wu zhounian shikuang diaocha fenxi." [Citizens sue officials: status, puzzle and reform: a report of investigating the reality of the fifth anniversary in implementing the Administrative Litigation Law in two regions: Guangxi and Ningxia]. *Zhengfu fazhi* (Taiyuan) [Governmental legal system] 5 (1996): 4-7.
- "Sheli xianfa weiyuanhui he zuigaofayuan weixian shencha bingxing de fuhe shencha zhi: wanshan wo guo weixian shencha zhidu de lingyizhong silu." [To establish a combined review system in which a constitution committee is parallel to a constitution-breaching tribunal within the Supreme People's Court: another thought on perfecting constitutional review system in our country]. *Faxue* [Jurisprudence] 4 (1998): 11-15.
- Cai Dingjian. "Fazhi de jinghua yu zhongguo fazhi de gaige: zou xiang fazhi zhi lu" [Evolution of the legal system and the reform on China's legal system: towards the road of the rule of law]. *Zhongguo faxue* [Chinese jurisprudence] 5 (1996): 3-11.
- Cao Siyuan. "Reform Court System to Deal with Localism." *VOA* interview. 30 March 1998.
- "Zhengfawei weixian" [The Political and Legal Commission breaches the constitution]. *Qianshao* [Front Scout]. May 2003. In *Boxun* (<http://peacehall.com/news/gb/pubvp/2003/08/20030811104.shtml>).
- Cao Jianming. "Cong fazhi dao fazhi" [From the rule by law to the rule of law]. *Tansuo yu zhengming* [Exploration and contention] 12 (1997): 4-6.
- Chen Guangzhong. *Zhongguo gudai sifa zhidu* [The judicial system in ancient China]. Beijing: Qunzhong chubanshe, 1984.
- Chen Lianfu. *Xinxingfa yu tanwu huilu fanzui* [The new criminal law and crimes of corruption and bribery]. Beijing: Xiyuan chubanshe, 1999.
- Chen Weili. "Jianshe shehuizhuyi fazhi guojia de jiazhi jichu" [The value basis of establishing a socialist country based on the rule of law]. *Shehui kexue* [Social science] (Shanghai) 6 (1996): 17-21.
- Chen Fang. "Qi ke lanyong zhengdi quan: yi fen zhengdi de diaocha" [How could

- the right of expropriation of land be misused: an investigation of land expropriation]. *Ban yue tan* [Semi-monthly talks] 18 (2002): 36-38.
- Chen Weidong and Zhang Tao. "Shourong shencha ruogan wenti yanjiu" [Studies on some issues of shelter and investigation]. in *Xingshi susongfa de xiugai yu wanshan* [The revision and perfection of the criminal procedural law] edited by Zhongguo faxue hui susong yanjiuhui [The Litigation Research Institute of the Chinese Law Academy]. Beijing: Zhongguo zhengfa daxue chubanshe, 1992.
- Chen Weidong. "Zhichi chengxu gongzheng zuowei sifa gaige mubiao" [Supporting procedural justice to be the goal of judicial reform]. *Jiancha ribao* [The Procuratorate Daily] online. 5 December 2002 (<http://www.jcrb.com.cn...id=8484>).
- Chen Sixi. "Lun wo guo lifa quanxian de huafen" [On the allocation of lawmaking power in our country]. *Zhongguo faxue* [Chinese jurisprudence] 1 (1995): 12-19.
- Chen Sixi and Liu Nanping. "Zhongguo xiandai xingzhengfa fazhan dui xianfa de Yingxiang" [Impacts of the development of administrative law in modern China on the constitution]. *Xingzheng faxue yanjiu* [Studies of administrative law] 1 (1998): 21-30 and 51.
- Chen Xi. "'Pingheng lun' de kunjing" [The dilemma of the theory of balance]. *Xingzheng faxue yanjiu*, no. 4 (1996): 37-41 and 26.
- Cheng Ganyuan and Li Zaihua. "Shichang jingji he xingzheng faxue 'kong quan lilun' de sikao" [Thinking of the market economy and the theory of power control in administrative jurisprudence]. *Xue hai* (Nanjing) [Sea of study] 5 (1994): 62-66.
- Cheng Yi. "Lüshi huibi yi" [A discussion of lawyers' withdrawal]. *Guofa wang* [National law web]. 28 March 2002 (<http://www.law.com.cn>).
- Dang Guoqing. "Qian tan laodong jiayang xuexiao" [A brief discussion of Re-Education Through Law schools]. *Zhongguo fazhi bao* [News of China's legal system]. (29 April 1985): 3.
- Deng Xiaoping. *Deng Xiaoping wenxuan, 1975-1982* [Selected works of Deng Xiaoping vol. 2]. Beijing: Renmin chubanshe, 1984.
- vol. 3. Beijing: Renmin chubanshe, 1993.
- Du Gangjian. "E'zhi xingzheng xuke de fanlan" [To curb rampant administrative approval]. *Zhongguo jingji shibao* [China economic times]. 22 September 2002 (<http://www.cet.com.cn/200209211.htm>).



- “Ershi yi shiji fazhi he qu he cong?” [What course to follow for the rule of law in the twentieth-first century]. *Fazhi ribao* [Legal daily]. (26 December 2000): 3.
- Fan Qingfang and Song Chao. “Shidai de qiangying: quanguo xingzhengfa yanjiuhui 1996 nian nianhui zongshu” [Strong voice of times: summary of the 1996 annual conference of the National Academic Institute of Administrative Jurisprudence]. *Falü kexue* (Xi’an) [Science of law] 2 (1997): 96-97.
- Feng Jun. “Lüelun wo guo xingzheng chengxu zhidu zhihou de yuanying, fazhan tiaojian yu qianjing” [A brief discussion of reasons behind the backward of our country’s administrative procedural system, conditions for its development and the prospect]. *Faxuejia* [The jurists] 2 (1998): 54-65.
- Gao Bing. “Kong quan lun: xiandai xingzheng faxue de lilun jichu” [Theory of power control: theoretical foundation of modern administrative jurisprudence]. *Nanjing shifan daxue xuebao* [Journal of the Nanjing Normal University] 4 (1998): 20-23.
- Ge Wenxiu. “Wo guo xingzhengfa muqian cunzai de wu da wenti ji duice” [Five major problems of the administrative law in current China and the jurisprudence]. *Nanjing shifan daxue xuebao* [Journal of the Nanjing Normal University] 4 (1998): 20-23.
- solutions]. *Dong Jiang xuekan* [Journal of the Eastern Frontier] 3 (2000): 104-108.
- Gong Pixiang, ed. *Dangdai Zhongguo de falü geming* [The contemporary Chinese legal revolution]. Beijing: Falü chubanshe, 1999.
- Gong Xiangrui. *Fazhi de lixiang yu xianshi* [The ideal of the rule of law and the reality]. Beijing: Zhongguo zhengfa daxue chubanshe, 1993.
- Guo Yunsheng and Yang Jianhua. “Lun shehuizhuyi fazhi guojia de biao zhun” [On the standards of a socialist country based on the rule of law]. *Shanxi daxue xuebao* [Journal of Shanxi University] 2 (1996): 1-8.
- Guo Daohui. “Fazhi xingzheng yu xingzheng quan de fazhan” [Administrative rule of law and the development of administrative power]. *Xiandai faxue* [Modern jurisprudence] 1 (1999): 11-14.
- Guo Luoji. “Fazhi: xianfa zhishang” [The rule of law: supremacy of the constitution]. *Zhengming* [Debate and contention] 292. (Hong Kong: Pakka Publisher, 1 February 2002): 71-74.
- Gu Yuan. “Ershi shiji Zhongguo fazhi huigu yu qianzhan yantaohui zongshu” [A Summary of the symposium on the retrospect and prospect of the rule of law in twentieth century in China]. *Zhengfa luntan* [Political and legal forum] 3 (2000): 157-159.
- Hao Jie. “Guojia peichang an’jian youguan falü wenti tantao” [Exploration of the relevant legal

- problems in state compensation cases]. *Renmin fayuan bao* [People's court daily] 2 April 2001. in *Jiancha ribao* [Procuratorate daily] website: Zhengyi Wang [Righteousness] (<http://211.100.18.62/fzdt/xwar.asp?id=6068>).
- He Yourong. "Difangzhuyi de chengying, weihai jiqi duice" [The reason, harm and solution of localism]. *Xinhua wenzhai* [New China digest] 2 (2002): 193.
- He Haibo. "Xingzheng susong shou an fanwei: yi ye sifa quan de shixian shi (1990-2000)" [The case-accepted scope of the administrative litigation: a page of history of realising judicial power]. *Xingzhengfa luntan* [Forum of administrative law]. 13 October 2001 (<http://www.1488.com.cn/bbs/showannounce.asp?>)
- Xingzheng susong chesu kao* [Thinking over withdrawal in administrative litigation]. Beijing: Falü chubanshe, 2002.
- He Qinglian. *Xiandaihua de xianjing: dangdai Zhongguo de jingji shehui wenti* [The trap of modernisation: economic and social problems in contemporary China]. Beijing: Jinri Zhongguo chubanshe, 1998.
- Huang Pei. "Lun 'bentu zhiyuan' yu fazhi de maodun congту: qian tan fazhi de yuanyuan yu linian" [On conflicts between 'local resources' and the rule of law: a preliminary discussion of the origin and concept of the rule of law]. *Falü tushuguan* [law library website] 11 March 2003 (<http://www.law-lib.com>).
- Huang Long. "Xingzheng lifa de minshi zhiyue wenti" [The problem of civil restriction of administrative lawmaking]. *Fazhi ribao* [Legal daily] (4 February 2002): 3.
- Jiang Zhikui. *Zhongguo fazhi shi yao* [An outline of the history of Chinese legal system]. Taibei: Guoli bianyiguan chubanshe, 1992.
- Jiang Lishan. "Zhongguo fazhi gaige he fazhizhuo guocheng yanjiu" [A study of China's legal reform and the process of legalisation]. *Zhong wai faxue* [China and foreign jurisprudence] 6 (1997): 35-46.
- "Zhongguo fazhi wenti taolun (xia)" [A discussion of the issue of China's rule of law: part two]. *Zhong wai faxue* 4 (1998): 21-33.
- Jiang Ming'an. "Cong renzhi zou xiang fazhi: zhongguo xingzhengfa shi nian huigu" [From the rule of man to the rule of law: retrospective of ten years of China's administrative law]. *Qiu shi xuekan* [Journal of seeking the truth] 6 (1997): 59-64.
- Zhongguo xingzheng fazhi fazhan jingcheng diaocha baogao* [The report of the investigation of the development of the process of China's administrative litigation]. Beijing: Falü chubanshe, 1998.

- “Dui yi qi malasong guansi de fansi” [Reflection of a Marathan case]. In *Zhengyi wang* 2 December 2002. (id=8473).
- Jiang Zemin. “Gao ju Deng Xiaoping lilun weida qizhi, ba jianshe you zhongguo tese shehuizhuyi shiye qianmian tui xiang ershiyi shiji” [Uprising highly of the great banner of Deng Xiaoping theory, and to fully push the cause of establishing socialism with Chinese characteristics into the twenty-first century]. *Qiu shi* [Seeking the truth] 18 (1997): 2-23.
- Jiang Dehai. “Chouxiang xingzheng xingwei ying naru xingzheng susong” [Abstract administrative actions should be included into administrative litigation]. *Zhengyi wang*. 26 August 2001. (id=7980).
- Ji Weidong. “Zhongguo xianfa gaige de tujing yu caichanquan wenti” [The problem of property rights and the way of the reform of China’s constitution]. *Dangdai Zhongguo yanjiu* [Contemporary China Studies] 3 (1999) (<http://www.gongfa.com/xianfajiweidong.html>).
- “Jinkuai wei laodong jiayang lifa” [The legislation of re-education through labour must be put on the agenda as soon as possible]. *Nanfang zhoubao* [Southern weekend news]. (21 September 2000): 13.
- Jing Hanchao. “Zhongguo wenhua yu sifa gaige” [The Chinese culture and the judicial reform]. *Presentation at the Xinan Zhengfa Daxue yantaohui* [The symposium held in the Southwest University of Political Science and Law]. 27 March 2002. (<http://www.law.com.cn>).
- “Laodong jiayang gongzuo zhineng jiaqiang buneng xueruo” [Re-education through labour can only be strengthened rather than weakened]. *Fazhi ribao* on line, 3 August 1997.
- Li Buyun, et al. “Lun yi fa zhi guo.” [On the administration of the state according to law] in *Renzhi yu fazhi wenti taolun ji* [Collected papers on the rule of man and the rule of law] edited by Zhang Jin. Beijing: Qunzhong chubanshe, 1981.
- “Yi fa zhi guo, jianli shehuizhuyi fazhi guo” [Administering the country according to law and establishing a socialist country based on the rule of law], in Li Buyun and Li Lin (eds.) *Yi fa zhi guo, jianli shehuizhuyi fazhi guojia* [Administering the state according to law, and to build up a socialist country based on the rule of law]. Beijing: Zhongguo fazhi chubanshe, 1996.
- “Xiandai fa de jingshen lungang” [The outline of spirit of modern law]. *Xinhua wenzhai* [New China news digest] 10 (1997): 19.
- “Fa de neirong he xingshi” [Content and form of law]. *Falü kexue* [Science of law] 3 (1997): 3-11.
- “Guanyu qicao ‘Zhonghua renmin gongheguo lifa fa (zhuanjia jianyi gao)’

- de ruogan wenti” [On several issues concerning drafting of ‘PRC Legislative Law’ (the experts’ recommendation draft)]. *Zhongguo faxue* [Chinese jurisprudence] 1 (1997): 11-19.
- “Shishi yi fa zhi guozhanlüe lungang” [Strategic outline of implementing the administration of the state according to law]. *Xuexi yu tansuo* [Study and exploration] (Harbin) 3 (1999): 66-72.
- Li Jiaofa. “Fazhi jianshe lungang” [A discussion outline on the rule of law]. *Xiangtan daxue xuebao* [Journal of Xiangtan University, Hunan] 6 (1997): 107-111.
- Li Youxing. “Zhongguo fazhi xiandaihua de nandian jiqi duice yanjiu” [Study of the difficulties of the modernisation of China’s legal system, and the solutions] *Zhejiang shehui kexue* [Zhejiang social science] 2 (1997): 73-78.
- Li Shuguang. “Lun yi fa zhi guo” [On the administering the state according to law]. *Gongren ribao* [Workers’ Daily]. (10 December 1997): 1.
- Li Yun. “Guanyu xingzheng an’jian fei zhengchang chesu de sikao” [Reflections on abnormal withdrawals of administrative cases]. *Zhongguo fayuan wang*, 5 June 2003. quoted in *Zhengyi wang* (<http://211.100.18.62/fzdt/xwnr.asp?id=9358>).
- Li Rui. “Shi lun Zhongguo falü wenhua” [A tentative discussion of Chinese legal culture]. *Jinan daxue xuebao* [Journal of Jinan University] 4 (1999): 62-66.
- Li Lin. “Fazhi de linian, zhidu de yunzuo” [The concept of the rule of law and its institutional operations]. *Falü kexue* [Science of law] 4 (1996): 3-12.
- Li Peng. speech at the 23<sup>rd</sup> legal lecture for NPC senior politicians. *Renmin ribao*. (28 January 2001): 1.
- Li Shaohua. “Lun dui chouxiang xingzheng xingwei de sifa shencha” [On the review of abstract administrative actions]. *Henan shen guanli ganbu xueyuan xue bao* [Journal of the Henan Provincial Administrative Cadres’s College] 2 (2000): 72-75.
- Li Shishi. “Fazhan yu wanshan wo guo lifa sikao” [Reflections on the development and perfection of China’s legislation] *Zhongwai faxue* [Chinese and foreign jurisprudence] 2 (1991): 26-30.
- Luo Haocai. “Xingzhengfa zi yuyi yu yiyi fenxi” [An analysis of discourse and meaning of administrative law]. *Fazhi yu shehui fazhan* [Legal system and social development] 4 (1995): 11-13.



- Li Fang. "Yi si bu gua de qingbai bushi ren de qingbai: ping Henan 'chunü maiyin an'." [It is not a person's innocence hung by a thread: a discussion of the case of Henan virgin prostitution]. *Zhongguo qingnian bao* [China youth's daily]. (10 June 2002): 7.
- Liang Zhiping. ed. *Falü de wenhua jieshi* [A cultural explanation of law]. Beijing: Sanlian shudian chubanshe, 1994.
- "Fazhi: shehui zhuanxing shiqi de zhidu jiangou: dui zongguo falü xiandaihua yundong de yige neizai guancha" [The rule of law: institutional construction during social transition: an inner observation of China's movement of legal modernisation]. *Dangdai zhongguo yanjiu* [Contemporary China studies] 2 (2000): 1-40 (print pages).
- Lin Xiaochun. "Laodong jiaoyang zhidu de gaige" [On reforming the re-education through labour system]. *Faxue yanjiu* [Studies of jurisprudence] 5 (1997): 114-117.
- Liu, Binnan. annot. *Lunyu zhengyi* [The annotation of the Analects]. in *Guoxue jiben congshu sibaizhong*, Vol. II edited by Wang Yunwu. Taipei: Shangwu yinshuguan, 1969.
- Liu Baosan. "Yi fa zhi guo jiqi yanjiu shuping" [Review of the recent studies on the administering the state according to law]. *Shehui kexue dongtai* (Wuhan) [Developments of social science] 12 (1996): 6-10.
- Liu Rongrong. "Yi fa zhiguo shi dang lingdao renmin zhili guojia de jiben fangfa: fang guowuyuan fu mishuzhang, guowuyuan fazhi ju juzhang Yang Jingyu" [Administering the state according to law is the basic strategy for the Party to lead the people in governing the country: interview with Yang Jingyu, the vice General-Secretary and Chief of the Legal Affairs Bureau in the State Council]. *Zhongguo dang zheng ganbu luntan* [Forum of the Party and political crdres] 1 (1998): 4-6.
- Liu Han and Li Lin. "Wuo.guo fazhi jianshe ershi nian chengjiu yu zhanwang" [Achievements and prospects of twenty's years of construction of the rule of law]. *Qiushi* [Seeking the truth] 23 (1998): 12-15.
- Liu Zuoxiang. "Quanli congту: yi ge zhide zhongshi de falü wenti" [The conflict of rights: a problem worth our attention]. *Zhejiang shehui kexue* [Zhejiang social science] 3 (2002): 54-61.
- Liu Haiqi. "Mai guan yu jue, fa bu rong" [Law does not allow selling official posts]. *Fazhi ribao* [Legal daily]. (4 June 2001): 1.
- Liu Hainian. "Yi fa zhi guo: Zhongguo shehuizhuyi fazhi jianshe xin de lichengbei" [Administering the state according to law: a new milestone of construction of China's socialist legal system]. *Faxue yanjiu* [Jurisprudential studies] 3 (1996): 24-36.

- “Lüelun shehuizhuyi fazhi yuanze” [A brief discussion of principles of socialist rule of law]. *Zhongguo faxue* [China’s legal science] 1 (1998): 6-9.
- Liu Jian. “Lun Zhongguo laodong jiaoyang zhidu yu guoji renquan gongyue de chongtu ji tiaozheng” [On the conflicts of China’s re-education through labour system with international conventions for human rights, and the adjustments]. *Faxue pinglun* [Jurisprudence review]. in *Kan Zhongguo* 26 May 2003 [Look China] (<http://www.secrechina.com/news/articles/3/5/26/43360.html>).
- Liu Renwen. “Laodong jiaoyang zhidu jiqi gaige.” [Re-education through labour system and its reform]. *Jiancha ribao* website [Procuratorate daily]: *Zhengyi wang*, 4 May 2001.
- Liu Junning. “Feng neng jin, yu neng jin, guowang buneng jin: zhengzhi lilun shiye zhong de caichanquan yu renli wenming.” [The wind can come in, rain can come in, but the king cannot come in: property rights and human civilisation in the perspective of political theory] in *Gonggong luncong: zhiyou yu shequn* [Public forum series: freedom and the community]. Beijing: Sanlian shudian, 1998.
- Liu Jingyou. “Jian lun chengxu bi shiti geng zhongyao” [A brief discussion on that the procedure is more important than the substance]. *Fazhi ribao* (17 February 2002): 3.
- Liu Zhanfeng. “Haishi ‘guan benwei’ zai zuosui: gaijing dang de zuofeng xilie tan zhiwu” [It is still the ‘official-basedness’ idea that makes mischief: part five of the series topics on improving Party style]. *Renmin ribao* (3 April 2001): 9.
- Liu Xin. “Renzhi yu shehuizhuyi fazhi buneng xiang jiehe.” [It is impossible for the rule of man to be united with socialist rule of law] in *Fazhi yu renzhi wenti taolun ji* [Collected papers of the debate on the topic of rule of law and rule of man] edited by Zhang Jun. Beijing: Qunzhong chubanshe, 1981.
- Luo Haocai and Yuan Hongshu. “Xiandai xingzhengfa de lilun jichu: lun xingzheng jiguan yu xiangdui yifang de quanli yiwu pingheng” [Theoretical foundation of modern administrative law: on the balance of rights and responsibilities between administrative agencies and the subject]. *Zhongguo faxue* [China’s legal science] 1 (1993): 52-59.
- Luo Haocai and Shen Gui. “Pingheng lun: dui xiandai xingzhengfa de yi zhong benzhi sikao: zai tan xiandai xingzhengfa de lilun jichu” [Theory of balance: an essential thought on modern administrative law—a second

- discussion of theoretical foundation of modern administrative law].
- Zhongguo faxue* [China's legal science] 4 (1996): 1-7.
- Ma Huide. "Guifan xingzheng xingwei: fangzhi fubai de bi you zhi lu" [It is the only way to prevent corruption by regulating administrative actions]. *Jiancha ribao*, 13 September 2000 (<http://www.jcrb.com.cn/ournews/asp/readnews.asp?id=3411>).
- "Guojia peichang fa san ren tan" [A discussion of the SCL among three people]. *Fazhi ribao* [Legal daily] (14 January 2001): 2.
- "Zhidu bianqian zhong de guojia peichang fa"[The state compensation law during the institutional transition]. *Xingzhengfa luntan* [Administrative law forum], 5 August 2001.
- "Congxin shenshi xingzheng shou an fanwei de falü guiding [Re-reviewing legal stipulations on the scope of administrative litigation], *Renmin fayuan bao*, 15 April 2002 in *Zhengyi wang* (id=6319).
- "Gong'an zhencha xingwei xingzheng ke su xing yanjiu" [Study of administrative litigationability of police investigation]. *Xingzhengfa luntan* [Administrative law forum] 25 October 2002 (<http://www.1488.com.cn/bbs/showannounce.asp?id>).
- Ma Huide and Ge Bowei. "Shijie maoyi zuzhi yu zhongguo xingzheng susong zhidu de fazhan" [The WTO organisation and the development of China's administrative litigation system]. *Zhengfa luntan* [Political and legal forum] 2 (2002): 12-15.
- Ma Changshan. "Gongmin yishi: Zhongguo fazhi jinchng de neiquli" [The consciousness of citizenship: the internal force for the process of China's legal system]. *Faxue yanjiu* [Jurisprudence studies] 6 (1996): 3-12.
- Peng Haipeng. "Tan qualli yinsu dui xingzheng susong zhi zhiyue jiqi duice" [Constraints on the power element over the Administrative Litigation Law, and the solutions]. *Xingzheng yu fa* [Administration and law] 3 (1998): 53-55.
- Qing Ping. "Guanyu guojia peichang fa de wanshan" [On the perfection of the state compensation law]. *Zhengyi wang* [*Jiancha ribao* website], 27 September 2002 (id=8168).
- Qiang Shigong. "Falü yizhi, gonggong lingyu he hefaxing" [Law transplanting, public domains and legitimacy]. see *Guo fa wang* [National law website] (<http://www.law.cn.com/classic/classic0001.htm>).
- Qing Qianhong. "Yi fa zhi guo he xianfa zhishang" [On the adminitering the state according to law and the supremacy of the constitution]. *Xinhua wenzhai* [New China news digest] 1 (1997): 10-15.

- Qiu Chunlan. "Shichang jingji yu fazhi jianshe zongshu" [A summary of the study on the market economy and the legal construction]. *Shoudu shifan daxue xuebao* [Journal of the Beijing Normal University] 4 (1994): 76-79.
- Qiu Shi. "Zhongguo gongchandang zhizheng de jiben jingyan" [The basic experience of the CCP rule]. *Xinhua wenzhai* [New China Digest] 7 (2002): 1-4.
- Qu Xiaoguang. "Lun wo guo de lifa chongtu" [A study of conflicts in lawmaking in our country]. *Zhongguo faxue* [Chinese jurisprudence] 5 (1995): 41-47.
- Shen Zhonglin. "Fazhi, fazhi, renzhi de ciyi fenxi" [A analysis of the meaning of the rule of law, rule by law and rule of man]. *Faxue yanjiu* [Jurisprudential studies] 4 (1989): 4-7.
- Shen Gui. "Shi xi xiandai xingzhengfa de jingyi: pingheng" [A tentative study of the essence of modern administrative law: balance]. *Xingzheng faxue yanjiu* [Administrative law studies] 3 (1994): 12-15.
- Shen Fujun. "Guanyu feichu laodong jiayang zhidu de sikao" [A reflection of abolishing re-education through labour system]. *Faxue* [The jurisprudence] 7 (1999): 18-20.
- Song Lu'an. "Laodong jiayang ying yu feichu" [RETL should be abolished]. *Xingzheng faxue yanjiu* [Studies of administrative jurisprudence] 2 (1996): 26-31.
- Song Caifa. "Yi fa xingzheng shi yi fa zhi guo de nandian he guanjian" [To exercise administrative power according to law is the difficulty and key for the administering the state according to law]. *Shehuizhuyi yanjiu* [Socialism studies] 1 (2000): 52-55.
- Tang Shiming. "Qian tan Zhongguo laodong jiayang jinxing gaige de biyaoxing" [A brief discussion of the necessity of reforming China's re-education through labour system]. *Dongfang fazhi wang* [Oriental web of rule of law]. 21 September 2002 (<http://law.eastday.com/epublish/gb/paper10/1/class001000001/hwz582109.html>).
- Tian Jiyun. Report at the Fourth Session of the Eighth Congress of the NPC. *Renmin ribao* [People's daily] (1 March 1997): 21.
- Tian Chengyou. "Rujia dezhi sixiang de de yu si" [The gains and losses of Confucian thought of the rule of virtue]. *Beijing University website*: (<http://www.chinalawinfo.com/research/lgyd/details.asp?lid=3387>).
- Tian Wenchang. "Guanyu xingxunbigong de shenceng sikao" [An intensive study of distracting confession by torture] *Fazhi raibao* (6 November 2002): 6.



- Tong Zuoping. "Gong'an xingzheng xingwei yu zhencha xingwei de queding" [To confirm police action between its public administration and criminal investigation]. *Renmin fayuan bao* (2 July 2001): 9.
- Tong Fuyong. "Jiage tingzheng hui liuyu xingshi" [Is the price hearing a formality?]. *Zhongguo jingji shibao* [China economic times] (2 September 2002): 3.
- Wang Jiafu, et al. "Lun fazhi gaige" [On the reform of the legal system]. *Faxue yanjiu* [Jurisprudential studies] 2 (1989): 1-9.  
 ---"Yi fa zhi guo jidai jie jue de xianshi wenti" [Realistic problems need to be resolved relating to the administering the state according to law]. *Liaowang* [Prospect] 10 (1998): 9-10.
- Wang Xizi. "Zai lun xiandai xingzhengfa de pingheng jingshen" [A second study of spirit of balance in modern administrative law]. *Fa shang yanjiu* [Legal and commercial studies] 2 (1995): 37-41.
- Wang Liming. "Ye tan yi fa zhi guo" [Yet more remarks on the administering the state according to law]. *Faxue pinglun* [Law Review] 2 (1999): 43-50.
- Wang Zhongyu. "Guanyu quanmian tuijin yi fa xingzheng de jige wenti" [On several issues concerning fully implementation of administering the state according to law]. *Guojia xingzheng xueyuan xuebao* [Journal of the State Administrative College] 4 (2001): 6-12.
- Wang Baoming. "Zhongguo xingzheng lifa pingshu" [Review on China's administrative lawmaking]. *Guojia xingzheng xueyuan xuebao* [Journal of the State Administrative College] 4 (2000): 68-70.
- Wang Wenshu. "Xingzheng fuyi nan zai hechu" [Where are the difficulties in administrative redress]. *Xingzheng yu fa* [Administration and law] 4 (1998): 21-22.
- Wang Zhonghuan. "Zhiding you Zhongguo tese de shourong jiayang fa tansuo" [A exploration of making a law concerning shelter and education or rehabilitation with Chinese characteristics]. *Shandong faxue* [Shandong jurisprudence] 1 (1998): 48-49.
- Wang Keqin. "Beijing chuzuche nongdun heimu" [The inside story of taxi monopoly in Beijing]. *Zhongguo jingji shibao* [China economic times]. 6 December 2002. in *Xingzhengfa luntan* 7 December 2002.
- Wang Jun. "Zhengfu guanzhi de jingji he falü wenti: Beijing shi chuzu hangye ge'an fenxi" [The economic and legal problems of governmental control:

- analysis of individual case in Beijing's taxi industry]. *Zhongguo gonggong guanli* [China public administration]. 12 January 2001. in *Shiji Zhongguo* [Century China] (<http://www.cc.org.cn> (22 September 2002)).
- Wang Hanbing, "Peng Zhen tongzhi dui wo guo shehuizhuyi mingzhu fazhi jianshe de zuoyue gongxian" [Remarkable contributions comrade Peng Zhen to our country's socialist democracy and legality]. *Guangming ribao* [Light daily]. (26 October 1997): 1.
- Wen Jiabao. "Quanguo nongchun shehui fazhan qingkuang" [The situation of social developments in national rural areas]. Speech at the *Conference of the Central Committee on Rural Work* held on 7 January 2002. *Zhengming* [Debate and contention] 252 (Hong Kong:Pahka Publisher, January 2002): 9-11.
- Wu Shucheng. *Zhongguo chuantong falü wenhua* [China's traditional legal culture]. Beijing: Beijing daxue chubanshe, 1994.
- Wu Jiaqi. "Xin quanweizhuyi shuping" [A review of Neo-Authoritarianism]. in *Xin quanweizhuyi: dui gaige lilun gangling de zhenlun* [Neo-Authoritarianism: debates on programmes of the reform theory]. (Beijing: Beijing jingji xueyuan chubanshe, 1989): 37-58.
- Wu Dexing. "Lun zhongguo xingzheng fazhi de chengxuhua xingzheng chengxu de fazhizhu" [On the proceduralisation of China's administrative legal system and the legalisation of its administrative procedures]. *Zhongguo renmin daxue xuebao* [Journal of People's University of China] 1 (1997): 83-88.
- Xia Yong. *Zhouxiang quanli de shidai: Zhongguo gongmin quanli fazhan yanjiu* [Towards an era of rights: study on the development of citizen rights in China]. Beijing: Zhongguo zhengfa daxue chubanshe, 1995.
- Xiao Yang. "Quan guo fayuan xingzheng shenpan gongzuo huiyi shang de jianghua" [Speech at the national court conference of administrative adjudication]. *Zhongguo lüshi wang* [Chinese lawyers web]. 3 December 1999 (<http://www.chineselawyer.com.cn>).
- "Zui gao renmin fayuan gongzuo baogao" [The SPC work report], in *Zhonghua renmin gongheguo falü nianjian* [The PRC law yearbook]. Beijing: Zhongguo falü nianjian chubanshe, 2001.
- Xie Pengcheng. "Lun shichang jingji falü tixi de jiben jiegou" [On the basic structure of the legal system in a market economy], *Faxue yanjiu* [Studies of Jurisprudence] 4 (1994): 50-57.
- Xiong Xianque. *Zhongguo sifa zhidu* [The Chinese legal system]. Beijing: Zhongguo Zhengfa Daxue chubanshe, 1986.
- Xu Chongde and Pi Dechun. *Xin zhongguo xingzheng faxue yanjiu shuping* [A summary of studies

- on new China's administrative jurisprudence]. Beijing: Falü chubanshe, 1991.
- Yang Jiejun. "Guanyu xingzhengfa lilun jichu ruogan guandian de pingxi" [A comment of several opinions on theoretical foundation of administrative law]. *Zhongguo faxue* [Chinese jurisprudence] 2 (1996): 64-75.
- "Tizhi, yuanze, fanwei: shijie maoyi zuzhi yu xingzheng susong zhidu biange" [The system, principle and scope: the WTO and the reform of the administrative litigation]. *Faxue* [Jurisprudence] 4 (2002).
- Yang Zhongwen and Liu Chunping. "Kong quan, pingheng: lun xingzhengfa de benzhi" [Power control and balance: on the essence of administrative law]. *Qiu shi xuekan* [Journal of seeking the truth] 2 (1997): 55-58.
- Yang Jingyu. "Guanyu 'Zhonghua renmin gongheguo xingzheng xuke fa cao'an' de shuoming" [Explaining the draft of 'PRC Administrative Licensing Law']. *Renda xinwen wang* [NPC news web], 26 August 2002 (<http://www.npcnews.com.cn>).
- Yang Haikun. "Zhongguo xingzheng chengxu fadianhua suo mainlin de kunnan ji women de shexiang" [Difficulties facing the codification of China's administrative procedures and our suggestions]. *Nanjing shehui kexue* [Nanjing social science] 9 (1998): 53-60.
- Ying Qiaohong. "Qian xi woguo fannongdun lifa zhong de jige wenti" [A brief discussion of several problems of anti-monopoly legislation in our country]. *Jiancha ribao* [Procuratorate daily], 4 March 2002 (<http://www.jcrb.com.cn>).
- Ying Songnian. "Yi fa xingzheng lun gang" [A discussion outline of exercising administrative power according to law], *Zhongguo faxue* [Chinese jurisprudence] 1 (1997): 29-36.
- "Wuo guo xingzheng chengxu falü zhidu zhi xianzhuang" [The current situation of our country's administrative procedural system]. *Zhengyi wang*. 3 December 1999 (<http://www.jcrb.com.cn> id=8168).
- "Wanshan xingzheng susongfa zhuanjia tan: xiugai xingzheng susongfa shi zai bi xing" [Experts talk on the perfection of the Administrative Litigation Law: it is bound to revise the ALL]. *Fazhi ribao*, 3 March 2002.
- Yu Xuede. "Fazhi haishi fazhi, zhi min haishi zhi guan: guanyu yi fa zhi guo wenti taolun guandian zongshu" [Rule of law or rule by law? Governing the people or governing the power? Summary of debates on the issue of administering the state according to law]. *Qianxian* [the Frontier] 12 (1997): 26-28.

- Yu Huaining. "Lun shichang jingji tiaojian xia de xingzheng quanli kongzhi" [On the control of administrative power on the condition of a market economy] *Shehuizhuyi yanjiu* [Socialism studies] 2 (1999): 73-75.
- Zha Qingjiu. "Ru Shi yu Zhongguo de xingzheng fazhi" [The entry into the WTO and China's administrative law regime].  
*Renmin ribao* online. 13 December 2001 (<http://www.peopledaily.com.cn>).
- Zhang Youyu. ed. *Zhongguo faxue sishinian* [Forty years of Chinese legal science]. Shanghai: Shanghai renmin chubanshe, 1989.
- Zhang Jingfan. *Zhongguo fazhi shi* [History of the Chinese legal system].  
 Beijing: Zhongguo renmin daxue chubanshe, 1981.  
 ---*Zhongguo falü shi lun* [A discussion of the history of Chinese law].  
 Beijing: Falü chubanshe, 1982.
- Zhang Lian. "Lun fazhi tongyi de shixian tujing yu cuosi" [On the ways and measures of realising unity of the legal system]. *Falü kexue* [Science of law] 1 (1997): 24-29.
- Zhang Yan and Liu Peijun. "Nongfu qi nian susong" [A rural woman's seven years of litigation].  
*Fazhi ribao* [Legal daily] (5 November 2002): 5.
- Zhang Zhengde. "Women de mubiao shi shehuizhuyi fazhi guo" [Our goal is a socialist country based on the rule of law]. *Xiandai faxue* [Modern jurisprudence] 5 (1988): 13.
- Zhang Jin. ed. *Renzhi yu fazhi wenti taolun ji* [Collected papers on the rule of man and the rule of law]. Beijing: Qunzhong chubanshe, 1981.
- Zhang Wenxian. "Zai lun jiangou you zhongguo tese de shehuizhuyi faxue" [Re-discussing the establishment of socialist jurisprudence with Chinese characteristics]. *Zhongguo faxue* [China legal science] 3 (1997): 30-39.
- Zhang Shangzuo. ed. *Zou chu digu de zhongguo xingzheng faxue* [China's administrative jurisprudence after its stepping out from the low land]. Beijing: Zhongguo zhengfa daxue chubanshe, 1991.
- Zhang Weiping. "Sifa tizhi yu jingji tizhi" [The judicial system and the economic system].  
*Renmin fayuan bao* online. 8 February 2002.
- Zhang Zhiming. "Zhongguo de falü jieshi" [China's law interpretation]. in *Falü jieshi wenti* [The issues in law interpretation] edited by Liang Zhiping. Beijing: Falü chubanshe, 1998, 165-197.  
 ---"Guanyu shenpan weiyuanhui gaige de sikao" [Thought about reform on the adjudication



- committee]. *Renmin fayuan bao* [People's court daily] 28 October 2002. *Zhengyi wang* (id=8296)
- Zhang Qingfu. *Fazhi jianshe shi nian* [Ten years of legal construction]. Lüyou jiaoyu chubanshe, 1988.
- Zhang Shaoyan. "Lun laodong jiayang lifa de jiben xingshi" [On the general situation of making laws regarding re-education through labour]. *Fazhi ribao* [Legal daily] (20 February 2001): 1.
- Zhang Weiying. *Qiye de qiyejia: qiye lilun* [Enterprises' entrepreneurs: The theory of contract]. Shanghai: Shanghai renmin chubanshe, 1995.
- Zhang Yinhong. "Zhengfawei fang'ai sifa duli" [The PLC hampers judicial independence]. *Beijing Daxue: Yanyuan pinglun* [Beijing University: *Yan Campus Review*] (2003) in *Boxun* (<http://peacehall.com/news/gb/pubvp/2003/07/200307301525.shtml>).
- Zhang Xiaolin. "'Guan benwei' yisi jiexi" [Explaining the idea of 'official-basedness']. *Renmin ribao* [People's daily] (17 January 2002): 9.
- Zhang Shuming. *Zhongguo 'zhengzhi ren': Zhongguo gongmin zhengzhi suzhi diaocha baogao* [China's 'political men': report of investigation of political quality of Chinese citizens]. Beijing: Zhongguo shehui kexue chubanshe, 1994.
- Zhao Xingen. *Lunyu xinjie* [A new annotation of the Analects]. Hefei: Anhui Daxue chubanshe, 1999.
- Zhao Bingzhi. "Zhongguo xingfa xiugai ruogan wenti" [Some problems regarding the revision of China's criminal law]. *Faxue yanjiu* [Studies of jurisprudence] 5 (1996): 6-54.
- Zhao Shiyi. "Lun caichanquan de xianfa baozhang yu zhiyue" [A discussion of constitutional safeguarding and curbing of property rights] *Faxue pinglun* [Jurisprudential review] 5 (1999), see *Xingzhengfa luntan*. 11 July 2001.
- Zhou Yongkuan. "Yi fa zhi guo, jieshe shehuizhuyi fazhi guojia lilun yantaohui shuping" [Review of the symposium on the administering the state according to law and build up a socialist country based on the rule of law]. *Fazhi yu shehui fazhan* [Legal system and social development] 2 (1997): 1-9.
- Zhou Hanhua. "'Lifa fa de he xian xing yanjiu' zuotanhui" [Symposium of study on the compliance of the legislative law with the constitution]. *Beida falü zhouban* [Weekly Law review of the Beijing University] 2:2 (2000): special issue.
- Zhou Yezhong. "Xianfa zhishang: zhongguo fazhi zhi lu de linghun" [The supremacy of the constitution: the soul for China's road of the rule of law]. *Zhongguo faxue wang* [Chinese jurisprudence web]. 17 June 2003 in *Zhengyi wang* (id=9436).

- Zhou Fenmian. "Yi fa xingzheng qineng zhishi kongtan" [How could the exercising administrative power according to law turn out to be hollow words]. *Fazhi ribao* (3 February 2002): 2.
- Zhu Suli and Qiang Shigong. "Zhongguo xiandaihua jingcheng zhong de fazhi wenti" [Problems of legal system during the modernisation in China]. In *Zhengyi wang* (first part, 20 July 2001) and (second part, 23 July) (<http://211.100.18.62/fzdt/xwar.asp?id=2071> and 2091).
- Su Li. *Fazhi jiqi bentu zhiyuan* [The rule of law and the local resources]. Beijing: Zhongguo zhengfa daxue chubanshe, 1996.
- Su Li. "Renzhen duidai renzhi: Weibo 'jingji yu shehui' de yige dushu biji" [Taking the rule of man seriously: a reading note on Weber's Economy and Society]. *Falü sixiang wang: Su Li wenji* [Legal thinking web: collected papers of Su Li, 1998] (<http://mylaw.myrice.com/fali/fali-suli.htm>).
- Zhonghua renmin gongheguo falü huibian (1979-84)* [The PRC law collection]. Beijing renmin chubanshe, 1985.
- Zhonghua renmin gongheguo falü quanshu* [The compendium of PRC laws]. Changchun: Jilin renmin chubanshe, 1989.
- Zhonghua renmin gongheguo fa ku* [A comprehensive collections of PRC laws], total ten vols. Renmin fayuan chubanshe, 2002
- Zhonghua renmin gongheguo zuigao renmin fayuan gongbao* [the PRC Supreme People's Court gazette].
- Zhonghua renmin gongheguo tongji nianjian* [The PRC statistic yearbook]. Beijing: Zhongguo tongji nianjian chubanshe, 2000, 2002, 2003.
- Zhongguo falü nianjian* [The law yearbook of China]. Beijing: Zhongguo falü nianjian Chubanshe, 2001, 2002, 2003.

#### **Frequent used website and newspapers (access between 2001 and 2004)**

- Renmin ribao* [People's daily], its online site: [www.people.com.cn](http://www.people.com.cn). Its English version online: <http://english.peopledaily.com.cn>
- Fazhi ribao* [Legal daily], and its website: [www.legaldaily.com.cn](http://www.legaldaily.com.cn)
- Jiancha ribao* [Procuratorate daily]. The name of its website is *Zhengyi wang* [Righteousness] at <http://211.100.18.62/fzdt/xwar.asp?id=>, or <http://www.jcrb.com.cn/zyw/>

*Xingzhengfa luntan* [Forum of administrative law], at [www.1488.com.cn/bbs/showannounce.asp?id](http://www.1488.com.cn/bbs/showannounce.asp?id),  
which is a part of the *Guo fa wang* [National law website, [www. Law.com.cn](http://www.Law.com.cn)].

*Renmin fayuan bao* [People's court daily], the website of Peoples' court  
(<http://www.chinacourt.org/>).

Falü tushuguan: Falü lunwen ziliaoku [Law library: collections of legal articles]  
at <http://www.law-lib.com/lw/>

*Boxun* [Extensive information]. A comprehensive overseas website for free speech and news  
relating to contemporary China (<http://www.boxun.com> or [www.peacehall.com](http://www.peacehall.com)).